TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 354.

T. B. MERRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF PALATKA, APPELLANT,

vs.

THE NATIONAL BANK OF JACKSONVILLE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED FEBRUARY 6, 1897.

(16,486.)

(16,486.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

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T. B. MERRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF PALATKA, APPELLANT,

vs.

THE NATIONAL BANK OF JACKSONVILLE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 6, 1898.

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a United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun, pursuant to law, on the third Monday of November, 1895, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit, and the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable Emory Speer, United States district judge for the southern district of Georgia.

T. B. MERRILL, Receiver, Appellant,
vs.
THE NATIONAL BANK OF JACKSONVILLE, Appellee. } No. 486.

Be it remembered that heretofore, to wit, on the ninth day of April, 1896, a transcript of the record of the above-styled cause from the circuit court of the United States for the southern district of Florida, was filed in the office of the clerk of the United States circuit court of appeals for the fifth circuit, in the words and figures following, to wit:

1 In United States Circuit Court, Fifth Circuit, in and for the Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka, Defendant. } In Chancery.

Bill.

The National Bank of Jacksonville, a corporation under the laws of the United States of America, and having its place of business at Jacksonville, Florida, brings this its bill of complaint, for itself and all other persons in like situation, who shall come in and make themselves parties to this suit, and contribute to the expenses thereof, against T. B. Merrill, as receiver of the First National Bank of Palatka, a corporation under the laws of the United States of America, and heretofore doing business at Palatka, in the State of Florida.

And thereupon, your orator complains and says as follows: That your orator is a corporation under the laws of the United States of America, and having its place of business at Jacksonville, in the State of Florida, where it was at the times hereinafter mentioned, and is now engaged in conducting the business of a national bank.

2 That the First National Bank of Palatka is a corporation under the laws of the United States of America, having its

place of business at Palatka, Florida, where, prior to the 17th day of July, A. D. 1891, it was engaged in conducting the business of a national bank.

That on the 17th day of July, A. D. 1891, the said First National Bank of Palatka failed, and closed its doors, and the Hon. E. S. Lacy, as comptroller of the United States of America, subsequent to said last-mentioned date, appointed this defendant, to wit: the said T. B. Merrill, as receiver of the First National Bank of Palatka, and the said receiver took charge of the said banking business, theretofore conducted by said First National Bank of Palatka, and all of the books, notes, accounts, property and effects of said First National Bank of Palatka.

That this court has jurisdiction of the parties to and their subject-matter to this suit; that this is a suit of a civil nature in equity; that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arises under the laws of the United States of America.

That at the time of the failure of the First National Bank of Palatka it was indebted to your orator for sundry drafts of said bank to the order of your orator on the Hanover National Bank of New York, amounting, with *with* fees, to $6,010.47 (six thousand and ten and $\frac{47}{100}$ dollars), which said indebtedness was unsecured by collateral.

And said First National Bank of Palatka was further indebted to your orator at the time of its failure in the sum of ten thou-
3 sand dollars ($10,000.00), and interest, for a loan made said bank by your orator on June 5th, A. D. 1891; that at the time said loan was made the said First National Bank of Palatka delivered to your orator their time certificate of deposit, No. 6120, due in sixty days from date, bearing interest at eight per cent., to which said bank attached, as collateral security, sundry notes belonging to said First National Bank of Palatka, to wit:

St. James on Gulf	$1,000 00
R. H. Mason	250 00
T. V. Hinks	300 00
G. U. Beach	300 00
G. U. Beach	2,000 00
The Florida Commercial Co	396 90
A. B. Mason	1,300 00
A. L. Hart	5,350 22
Total	$10,896 22

The total indebtedness due to your orator from the First National Bank of Palatka on the day of its failure was:

For sundry drafts	$6,010 47
For certificate of deposit, loan and interest	10,093 34
Total amount due	$16,103 81

Making a total of sixteen thousand, one hundred and three and $\frac{81}{100}$ dollars ($16,103.81) due to your orator from the First National Bank of Palatka on the 17th day of July, A. D. 1891.

4 That your orator proved its claim, in due form of law, before said receiver aforesaid, for six thousand and ten and $\frac{47}{100}$ dollars, being amount of drafts due to your orator from said First National Bank of Palatka, and upon which said amount so proven your orator has received distributions as follows:

December 10th, 1892, 35 %	$2,103 67
May 17th, 1893, 10 %	601 05
Total	$2,704 72

That in addition to proving the amount of $6,010.47 due on sundry drafts aforesaid, your orator offered to prove up its claim for $10,000.00, being amount of certificate of deposit secured by collateral, as aforesaid, but the said defendant receiver would not permit your orator to prove the total amount of $10,000.00 and interest due thereon for said loan as aforesaid, but under the ruling of the comptroller of the United States of America, your orator was not allowed to prove its claim in full before the defendant receiver, but was ordered to first exhaust the collateral given to secure said loan for $10,000.00, as aforesaid, and then to prove the claim for the difference between the amount of the loan and interest, and the amount realized from said collateral.

Under the ruling of the comptroller your orator collected all of the notes given as collateral to secure said loan of $10,000.00, except the note of H. L. Hart, for five thousand three hundred and fifty and $\frac{22}{100}$ dollars; which last-mentioned note was placed in judgment, and which judgment was non-productive, and which

5 said judgment has been assigned and transferred by your orator to the defendant herein as receiver, as aforesaid.

That after exhausting the collateral your orator proved its claim for the balance due on said certificate of deposit for $10,000.00, so secured by said collateral, as aforesaid, to wit: for the sum of four thousand four hundred and ninety-six and $\frac{44}{100}$ dollars, upon which said balance of $4,496.44 your orator has received the following dividends from the defendant receiver, to wit:

December 1st, 1892	$1,573 75
May 17th, 1893	449 64
Total	$2,033 39

That the defendant should have allowed your orator to have proven its entire claim of $16,103.81, and to have received *pro rata* dividends upon the entire amount thereof.

That your orator is informed and believes, and upon such information and belief so charges the truth to be, that the same rule was applied as to other creditors of the said First National Bank of Palatka, and that it was an erroneous and illegal manner of de-

claring a dividend. That your orator gave due notice that it would demand a *pro rata* dividend upon the whole amount due your orator, without deducting the amount collected on collateral security, to wit: that it would demand a *pro rata* dividend upon $16,103.81, and interest thereon from the 17th day of July, A. D. 1891.

That your orator does not know, without a discovery, what amount of assets the defendant, as such receiver, did receive, and what disposition he made of them, or what amount your
6 orator is justly entitled to receive under the distribution by the receiver herein, and that an accounting is necessary to ascertain the same.

That there has been great delay in winding up the matters of said First National Bank of Palatka by said receiver.

That the defendant has made no distribution of the assets of said bank since the 17th day of May, A. D. 1893.

All of which actings and doing are contrary to equity. To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby and herein prayed; and may, upon his corporal oath, and according the utmost of his knowledge, remembrance, information and belief, full, true, direct and pefect answer make to all and singular the matters herein set forth, as if particularly interrogated thereunto.

And your orator prays as follows:

That the defendant may discover the amount of assets of said First National Bank of Palatka that came into his hands, and account for the same, and that the defendant may be decreed to pay to your orator (and to all other creditors of said First National Bank of Palatka in like situation, who may come in and make themselves parties to this suit, and contribute to the expenses thereof) a *pro rata* distribution upon the entire amount of indebtedness due to your orator from the said First National Bank of Palatka, to wit: upon the sum of sixteen thousand one hundred and three and $\frac{81}{100}$ dollars, together with interest thereon from the 17th day of July, A. D. 1891, without deducting therefrom the amount
7 realized from collateral given to secure a portion of said amount due your orator from said bank as aforesaid.

That the defendant may wind up the affairs of said bank and of his said receivership thereof, without further delay.

And that your orator may have such other and further relief in the premises as to your honor may seem meet, and the necessities of this case may require, and as shall be agreeable to equity.

May it please your honor to grant unto your orator the writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, to be directed to the defendant, T. B. Merrill, as receiver of the First National Bank of Palatka, a corporation incorporated under the laws of the United States of America, commanding him, at a certain time, and under a certain penalty, to be therein limited, personally to be and appear before this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to

stand to, perform and abide such further order, direction and decree herein as to this honorable court may seem meet.

COOPER & COOPER,
Solicitors for Complainant.

(Endorsed:) In United States circuit court, fifth circuit, in and for southern district of Florida. In chancery. National Bank of Jacksonville *vs.* T. B. Merrill, receiver. Filed Sept. 11, 1894. E. O. Locke, clerk. Bill. Cooper & Cooper, solicitors for complainant.

8 UNITED STATES OF AMERICA, }
Southern District of Florida. }

The President of the United States of America to T. B. Merrill, as receiver of the First National Bank of Palatka, a corporation incorporated under the laws of the United States of America:

We command you, and every one of you, that you appear before the judges of the circuit court of the United States of America, for the fifth circuit and southern district of Florida, at Jacksonville, in said district, on the first Monday, being the fifth day of November next, to answer to a bill of complaint exhibited against you by the National Bank of Jacksonville, a corporation under the laws of the United States of America, and having its place of business at Jacksonville, Florida, and filed in the clerk's office of said court, and then and there to receive and abide by such judgment and decree as said court shall have considered in this behalf. And this you are not to omit, upon pain of judgment by default being pronounced against you.

To the marshal of the United States to execute and return.

9 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of
[SEAL.] this court, at the city of Jacksonville in said district, this eleventh day of September, A. D. 1894.

E. O. LOCKE, *Clerk*,
By N. A. GREENING, *D. C.*

COOPER & COOPER,
Solicitors for Complainant.

Memorandum.

The above-named defendant is notified that unless he shall enter his appearance in the clerk's office of said court, at Jack-
[SEAL.] sonville aforesaid, on or before the day to which the above is returnable, the complaint will be taken against him as confessed, and a decree entered accordingly.

E. O. LOCKE, *Clerk*,
By N. A. GREENING, *D. C.*

Received the within writ on the 11th day of September, A. D. 1894, at Jacksonville, Florida, and executed the same by delivering a true copy hereof to T. B. Merrill, as receiver of the First National

Bank of Palatka, at the same time exhibiting to him this original, at Palatka, Florida, on September 14th, A. D. 1894.

JAMES McKAY,
U. S. Marshal.

10 No. 112. Circuit court United States, southern district of Florida. The National Bank of Jacksonville *vs.* T. B. Merrill, receiver. Chancery subpœna. Returnable to rule day, first Monday in November, A. D. 1894. E. O. Locke, clerk, by N. A. Greening, D. C. Filed September 14, A. D. 1894. E. O. Locke, clerk. Cooper & Cooper, complainant's solicitors.

11 In the United States Circuit Court, Fifth Judicial Circuit, in and for the Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, a Corporation under the Laws of the United States of America, Complainant,
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka, a Corporation under the Laws of the United States of America, Defendant.
} In Chancery.

Now comes the complainant in the above-stated cause, by Cooper & Cooper, its solicitors, on this the rule day in November, 1894, being the rule day next succeeding the appearance day in said cause, and the said defendant above named in above-entitled cause having failed to file plea, demurrer or answer to complainant's said bill of complaint, on the said rule day, and the said defendant aforesaid being in default thereof, the said complainant now elects to enter its order (as of course) in the order book that its bill be taken *pro confesso*, and the said complainant does now enter said order that its said bill and all its allegations be taken as confessed by the said defendant above named in above-stated cause.

Let the defendant aforesaid take notice that as of its right the complainant will proceed *ex parte* in said cause.

COOPER & COOPER,
Solicitors for Complainant.

12 The clerk of said above-named court will please enter the above order in the order book.

COOPER & COOPER,
Solicitors for Complainant.

(Endorsed:) In the United States circuit court, fifth judicial circuit, in and for the southern district of Florida. In chancery. National Bank of Jacksonville, complainant, *vs.* T. B. Merrill, receiver, defendant. Order taking bill *pro confesso* and præcipe for entry of same. Filed Nov. 5, 1894. E. O. Locke, clerk. Cooper & Cooper, solicitors for complainant.

In the Circuit Court of the United States, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka. } In Chancery.

The demurrer of T. B. Merrill, as receiver of the First National Bank of Palatka, to the bill of complaint of The National Bank of Jacksonville, the above-named plaintiff.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is herein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth—

13 First. That the said bill does not contain any matter of equity whereon this court can ground any decree or give any relief against this defendant.

Second. Because the complainant seeks to make proof of its claim without deducting amounts collected by it from collateral securities prior to making proof, and further seeks to compel the defendant to pay it ratably in proportion with other creditors on a basis of the gross amount of indebtedness without crediting the collections from said collateral securities.

Third. Because the complainant is estopped in equity from making new proof, having made proof according to law and received dividends upon the basis of the said proof.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

JOHN WURTS AND
E. E. HASKELL,
Counsel for Defendant.

14 STATE OF FLORIDA, }
County of Putnam. }

Personally appeared before me this day T. B. Merrill, who being first duly sworn, says that he is the defendant who files the foregoing demurrer and that the same is not interposed for delay.

T. B. MERRILL.

Sworn to and subscribed before me this 22d day of November, 1894.

COOK CARLETON,
[SEAL.] *Notary Public, State of Florida at Large.*

In my opinion the foregoing demurrer is well founded in point of law.

JOHN WURTS,
E. E. HASKELL,
Of Counsel for the Defendant.

(Endorsed:) In circuit court of U. S., sou. dist. of Florida. In chancery. Nat. Bank of Jac. *vs.* T. B. Merrill. Demurrer. Filed Nov. 26, 1894. E. O. Locke, clerk. Overruled June 26, 1895. E. O. Locke, clerk.

15 In United States Circuit Court, Fifth Circuit, in and for the Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka, Defendant. } In Chancery.

Now on this day comes the complainant in the above-stated cause and sets down for argument on the 7th day of January, A. D. 1895, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, the demurrer of the defendant to the bill of complaint in the said above-entitled cause.

COOPER & COOPER,
Solicitors and of Counsel for Complainant.

(Endorsed:) In United States circuit court, fifth circuit, in and for southern district of Florida. In chancery. National Bank of Jacksonville *vs.* T. B. Merrill, as receiver. Filed January 7, 1895. E. O. Locke, clerk. Setting down of demurrer. Cooper & Cooper, solicitors for complainants.

16 In U. S. Circuit Court, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver, &c.

This cause coming on to be heard on the demurrer of defendant to the bill and having been argued by counsel, it is ordered and adjudged that said demurrer be and same is hereby overruled, and defendant given until rule day in August, 1895.

June 25, 1895.

JAMES W. LOCKE, *Judge.*

(Endorsed:) National Bank of Jacksonville *vs.* T. B. Merrill, receiver. Decree overruling demurrer. Filed June 26, 1895. E. O. Locke, clerk.

17 In the Circuit Court of the United States, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver, etc.
} In Chancery.

The answer of T. B. Merrill, as receiver of The First National Bank of Palatka, the defendant, to the bill of complaint of The National Bank of Jacksonville, the complainant.

This defendant, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering says:

I.

That this defendant has never made or declared any dividend to the creditors of the First National Bank of Palatka; on the contrary thereof, this defendant says that he was made receiver of the said bank by appointment of the United States Comptroller of the Currency under section 5234 of the Revised Statutes, and that since his said appointment he has paid over to the said comptroller all moneys derived by him from the assets of the said bank in accordance with the terms of the said law, and that the *appointment* to the
18 complainant and the dividend thereunder set forth in the bill of complaint were made by the said comptroller, and this defendant had nothing whatever to do therewith, except to transmit to the complainant the checks of the said comptroller representing the said payments, which said payments were made in pursuance of the provisions of section 5236 of the Revised Statutes, and that this defendant has not, and cannot have any authority to make disbursements to any of the creditors of the said bank, nor has he in his hands any funds which are available for that purpose; on the contrary thereof this defendant is charged under the law of his appointment with the duty of transmitting to the comptroller all moneys realized from the assets of the said bank.

II.

And further answering the said bill this defendant denies that the complainant gave due notice that it would demand a *pro rata* dividend upon the whole amount due to it without deducting the amount collected on collateral security; on the contrary thereof this defendant avers the fact to be that the complainant accepted the said ruling of the said comptroller without demur and accepted from the said comptroller, through this defendant, without protesting notice of any kind, the checks of the said comptroller in payment of the dividends mentioned in the bill, and that it was not until the 15th of March, 1894, that the complainant gave notice of any kind that it dissented from the said ruling of the comptroller

and would demand payment upon a different basis; that since December 1st, 1892, the said comptroller has made disposition of the assets of the said bank in his hands in good faith, believing
19 that the matter of his said ruling was at rest; so that the complainant should now be estopped to demand an apportionment on a different basis.

III.

And further answering the said bill this defendant says that he has realized in money from the assets of the said bank the sum of $176,317.91; that under the orders of the said comptroller he has disbursed the sum of $31,561.33 for the expenses of his receivership, "in which expenses are included moneys paid on decree in litigated case in this court, and for loans paid, etc., amounting to the sum of $17,653.55;" that he has transmitted to the said comptroller, as required by law, the sum of $143,849.03; that there remains in the hands of this defendant the sum of $907.55, which is subject exclusively to the orders of the said comptroller, and that the remaining assets of the said bank consist of sundry parcels of real property and some securities and choses in action, many of which are absolutely worthless, and the value of the rest of which cannot be estimated.

IV.

And further answering the said bill this defendant denies that there has been great, or any, delay in winding up the matters of the said bank; on the contrary thereof, the assets of the said bank have been realized upon with the utmost expedition consistent with the character of the same, and the great business depression which has existed in Florida since this defendant took charge of the affairs of the said bank. Moreover, this defendant, in all matters concerning the management of the assets of the said bank, has acted
20 strictly in accordance with instructions received from the Comptroller of the Currency.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged; without this, that there is any other matter, cause, or thing, in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true, to the knowledge or belief of this defendant; all of which matters and things this defendant is willing and ready to aver and prove as this honorable court shall direct; and humbly prays to be hence discharged with his reasonable costs and charges, in this behalf most wrongfully sustained.

T. B. MERRILL,
Receiver of the First National Bank of Palatka.

FLETCHER & WURTS AND
E. E. HASKELL,
Defendant's Counsel.

STATE OF FLORIDA, }
County of Putnam. }

Personally appeared before me this day T. B. Merrill, who, being first duly sworn, says that he is the defendant who files the foregoing answer; that he has read the said answer, and knows the statements therein made, and that the same are true in so far as they are alleged as true; and in so far as they are alleged on
21 information and belief, he is informed that they are true, and he believes them to be true.

T. B. MERRILL.

Sworn to and subscribed before me this 18th day of July, 1895.
[SEAL.] D. M. KIRBY,
Notary Public.

(Endorsed:) In circuit court of the United States, southern district of Florida. In chancery. National Bank of Jacksonville *vs.* T. B. Merrill, receiver. Answer. Filed Aug. 5th, 1895. N. A. Greening, D. C. Fletcher & Wurts, attorneys for defendant.

In United States Circuit Court, Fifth Circuit, in and for Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, a Corporation under the Laws of the United States of America, Complainant,
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka, Defendant. } In Chancery.

Exceptions Taken by the Above-named Complainant to the Answer of the Defendant for Insufficiency.

22 First exception. For that the defendant has not, to the best and utmost of his knowledge, remembrance, information and belief answered and set forth whether the complainant is a corporation under the laws of the United States of America, and having its place of business at Jacksonville, in the State of Florida, and as to whether or not it was at the times mentioned in the bill of complaint, and is now engaged in conducting the business of a national bank.

Second exception. For that the defendant has not, to the best and utmost of his knowledge, remembrance, information, and belief, answered and set forth whether the First National Bank of Palatka is a corporation under the laws of the United States of America, having its place of business at Palatka, Florida, where, prior to the 17th day of July, A. D. 1891, it was engaged in conducting the business of a national bank.

Third exception. For that the defendant has not, to the best and utmost of his knowledge, remembrance, information and belief, answered and set forth whether, on the 17th day of July, A. D. 1891,

the said First National Bank of Palatka, failed, and closed its doors and whether the Hon. E. S. Lacy, as comptroller of the United States of America, subsequent to said last-mentioned date, appointed this defendant, to wit: the said T. B. Merrill, as receiver of the First National Bank of Palatka, and whether or not the said receiver took charge of the said banking business theretofore conducted by said First National Bank of Palatka, and all of the books, notes, accounts, property and effects of said First National Bank of Palatka.

23 Fourth exception. For that the defendant has not, to the best and utmost of his knowledge, remembrance, information and belief, answered and set forth whether this court has jurisdiction of the parties and the subject-matter of this suit, and whether this is a suit of a civil nature in equity, and whether or not the matter in dispute exceeds, exclusive of interest and cost, the sum or value of two thousand dollars, and whether or not the same arises under the laws of the United States of America.

Fifth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether, at the time of the failure of the First National Bank of Palatka, it was indebted to your orator, the complainant herein, for sundry drafts of said bank, to the order of your orator, on the Hanover National Bank of New York, amounting, with fees, to $6,010.47, and whether or not said indebtedness was unsecured by collateral.

Sixth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether the First National Bank of Palatka was further indebted to your orator, the complainant herein, at the time of its failure, in the sum of $10,000.00, and interest, for a loan made said bank by your orator, on June 5th, 1891, and whether, at the time *of* said loan was made the said First National Bank of Palatka delivered to your orator their time certificate of deposit, No. 6120, due sixty days from date, bearing interest

24 at eight per cent., to which said bank attached, as collateral security, sundry notes belonging to said First National Bank of Palatka, to wit:

St. James on Gulf	$1,000 00
R. H. Mason	250 00
T. V. Hinks	300 00
G. U. Beach	300 00
G. U. Beach	2,000 00
The Florida Commercial Co.	396 90
A. B. Mason	1,300 00
A. L. Hart	5,350 22
Total	$10,896 22

Seventh exception. For that the defendant has not, in manner aforesaid, answered and set forth whether the total indebtedness due to your orator, the complainant in this cause, from the First National Bank of Palatka, on the day of its failure, was:

For sundry drafts ...	$6,010 47
For certificate of deposit, loan and interest	10,093 34
Total amount due	$16,103 81

Making a total of $16,103.81 due to your orator from the First National Bank of Palatka on the 17th day of July, A. D. 1891.

Eighth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether your orator proved its claim in the due form of law before said receiver aforesaid, for $6,010.47, being amount of drafts due to your orator from
25 said First National Bank of Palatka, and whether, upon which said amount so proven, your orator has received distribution, as follows:

December 10, 1892, 35% ...	$2,103 67
May 17th, 1893, 10%	601 05
Total	$2,704 72

Ninth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether, in addition to proving the amount of $6,010.47 due on sundry drafts as aforesaid, your orator offered to prove up its claim for $10,000.00, being amount of certificate of deposit secured by collateral as aforesaid, and whether the said receiver would not permit your orator to prove the total amount of $10,000.00 and interest due thereon for said loan, as aforesaid, and whether, under the ruling of the comptroller of the United States of America, your orator was not allowed to prove its claim in full before the defendant receiver, and whether it was ordered to first exhaust the collateral given to secure said loan for $10,000.00, as aforesaid, and then to prove the claim for the difference between the amount of the loan and interest and the amount realized from said collateral.

Tenth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether, under the ruling of the comptroller, your orator collected all of the notes given as collateral to secure said loan of $10,000.00, except the note of H. L. Hart, for $5,350.22, and whether said last-mentioned note was placed in judgment, and whether said judgment was non-productive, and whether said judgment has been assigned and transferred by your orator to the defendant herein, as receiver, as aforesaid.

26 Eleventh exception. For that the defendant has not, in manner aforesaid, answered and set forth whether, after exhausting the collateral, your orator proved its claim for the balance due on said certificate of deposit for $10,000.00, so secured by said collateral as aforesaid, to wit: for the sum of $4,496.44, and whether, upon said balance of $4,496.44, your orator has received the following dividends from the defendant receiver, to wit:

December 1st, 1892	$1,573 75
May 17th, 1893	449 64
Total	$2,033 39

Twelfth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether the defendant should have allowed your orator to have proven its entire claim of $16,103.81, and to have received *pro rata* dividends upon the entire amount thereof.

Thirteenth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether the same rule was applied as to other creditors of the said First National Bank of Palatka, and whether it was an illegal and erroneous manner of declaring a dividend.

Fourteenth exception. For that the defendant has not, in manner aforesaid, answered and set forth what amount of assets the defendant, as such receiver, did receive, and what disposition he made of them, or what amount your orator is justly to receive under the distribution by the receiver herein, and whether an accounting is necessary to ascertain the same.

27 Fifteenth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether the defendant has made distribution of the assets of said bank since the 17th day of May, A. D. 1893.

Sixteenth exception. For that the defendant has not, in manner aforesaid, discovered the amount of assets of said First National Bank of Palatka, that came into his hands, and accounted for the same.

The said portion of defendant's answer, purporting to be an answer thereto, being in words and figures as follows:

"III.

"And further answering the said bill, this defendant says that he has realized in money from the assets of the said bank the sum of $176,317.91; that under the order of the said comptroller he has disbursed the sum of $31,561$\frac{3}{4}$, for the expenses of his receivership," in which expenses are included moneys paid on decree in litigated case in this court, and for loans paid, etc, amounting to sum of $17,653.55; that he has transmitted to the said comptroller, as required by law, the sum of $143,849.03; that there remains in the hands of this defendant the sum of $907.55, which is subject exclusively to the orders of the said comptroller; and that the remaining assets of the said bank consists of sundry parcels of real property and some securities and choses in action, many of which are absolutely worthless, and the value of the rest of which cannot be estimated."

In all which particulars the complainant excepts to the answer of the defendant, T. B. Merrill, as receiver of the First National

28 Bank of Palatka, as evasive, imperfect and insufficient, and prays that the defendant may be compelled to put in a full and sufficient answer thereto.

Seventeenth exception. This complainant further excepts to so much of the complainant's answer as is contained in the second paragraph thereof, commencing with the words, "on the contrary

thereof," and ending with the words, "upon a different basis," on the grounds that the same constitutes no defence, and upon the ground that even admitting the allegation of the answer to be true, same would have no bearing upon the fund undisbursed, in this trust matter, and that the same is impertinent.

Eighteenth exception. The complainant further excepts to so much of the second paragraph of defendant's answer as is contained therein, commencing with the words, "that since December 1st, 1892," and ending with the words, "was at rest," and to so much of the second paragraph in the said answer, commencing with the words, "so that," and ending with the words "basis," at the end of said second paragraph, on the grounds that the same constitutes no defence, and on the further grounds that, admitting the same to be true, same would have no bearing upon the fund undistributed, and that the same is impertinent.

Ninteenth exception. The complainant further excepts to so much of the said answer as is contained in the third paragraph of defendant's said answer, on the ground that the same is not a full and complete discovery of the assets of said bank received by said receiver; that the same is not responsive to the allegations of the bill; is vague, and indefinite, and impertinent.

29 Twentieth exception. This complainant further excepts to so much of the fourth paragraph of the defendant's answer commencing with the words, "Moreover, this defendant," and ending with the word, "currency," at end of said paragraph, on the grounds that the same is not responsive to the allegations of the bill, and that the same constitutes non-defence to the bill, and is impertinent. In all which particulars the complainant excepts to the said answer as impertinent and insufficient, and insists that the same ought to be expunged from said answer.

JOHN C. COOPER,
Solicitor for Complainant.

(Endorsed:) In United States circuit —, fifth circuit, in and for southern district of Florida. In chancery. National Bank of Jacksonville *vs.* T. B. Merrill, receiver. Filed this 2d day of Sept., A. D. 1895. E. O. Locke, clerk. Exceptions to answer. Cooper & Cooper.

30 In United States Circuit Court, Fifth Circuit, in and for the Southern District of Florida.

The National Bank of Jacksonville *vs.* T. B. Merrill, as Receiver of the First National Bank of Palatka, Defendant.	In Chancery.

Now, on this the rule day in October, A. D. 1895, comes the complainant in the above-stated cause, and sets down for argument before his honor the judge of the above-stated court, on Monday, November 4th, A. D. 1895, at 10 o'clock a. m., or as soon thereafter

as counsel can be heard, the exceptions filed on the 2d day of September, A. D. 1895, to the answer of the defendant to the bill of complaint in the above-stated cause.

J. C. COOPER,
Solicitor for Complainant.

(Endorsed:) In the United States circuit court, fifth circuit, in and for *northern* district of Florida. In chancery. National Bank of Jacksonville *vs.* T. B. Merrill. Filed Oct. 7th, 1895. E. O. Locke, clerk. Setting down of exceptions for argument. Cooper & Cooper.

31 In the United States Circuit Court, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver, etc.

The defendant and his solicitors will please take notice that on Monday, the 23d day of December, A. D. 1895, at 10 a. m., or as soon thereafter as counsel can be heard, I will call up before the said court for a hearing the exceptions to the defendant's answer in the above-stated cause.

J. C. COOPER,
Solicitor for Plaintiff.

Service accepted December 3d, 1895.
FLETCHER & WURTS,
Solicitors for Defendant.

(Endorsed:) In the United States circuit court, fifth circuit, in and for southern district of Florida. The National Bank of Jacksonville *vs.* T. B. Merrill, as receiver, etc. Filed this 4th day of December, A. D. 1895. E. O. Locke, clerk. Notice to hear exceptions. J. C. Cooper, attorney for plaintiff.

32 THURSDAY, *January 9th*, 1896.

Present: Hon. Jas. W. Locke, district judge.
Ordered that court be opened.
And court is opened by due proclamation.

NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, Receiver.

Ordered, that the exceptions to the answer herein be overruled, without prejudice to an amendment of the prayer of the bill asking that the receiver be instructed to certify to the comptroller the proof of the claim as desired.

* * * * * * *

In the United States Circuit Court, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka. } In Chancery.

Now comes the complainant, by its solicitor, and sets down this cause for final hearing upon the bill and answer filed herein, January 29th, 1896.

J. C. COOPER,
Solicitor for Complainant.

33 (Endorsed:) In United States circuit court, fifth circuit, in and for southern district of Florida. National Bank of Jacksonville *vs.* T. B. Merrill, as receiver. Filed this 29th day of January, A. D. 1896. N. A. Greening, deputy clerk. Notice setting down case on bill and answer. J. C. Cooper.

In the United States Circuit Court, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka. } In Chancery.

This cause having been set for final hearing upon the bill and answer herein, and having been argued by counsel, and the court having considered of its decree,

It is ordered, adjudged and decreed, that the complainant is entitled to receive from the assets of the said First National Bank of Palatka a distributive share and dividend as one of the creditors of said bank, based upon, and to be calculated upon the whole amount of the indebtedness due said complainant from said bank, principal and interest, to wit: upon the basis of the sum of sixteen thousand one hundred and three and eighty-one one-hundredths dollars ($16,103.81), as the amount of the indebtedness due complainant on July 17th, 1891, with interest thereon from July 17th, 1891,
34 and crediting thereon as partial payments the dividends heretofore paid on the dates of their several payments.

It is further ordered, adjudged and decreed, that the said defendant, as receiver, declare the dividend to be due to complainant upon the said basis of its said claim, as above stated, and that said amount of such dividend should be paid out of any assets of the defendant bank which were in the hands of the said defendant, as receiver, on the 15th day of March, 1894, or came into his hands since the said 15th day of March, 1894, after the payment out of such assets of any costs and expenses of such receivership as may have remained unpaid since the 15th day of March, 1894.

It is further ordered, adjudged and decreed, that the said defendant, as such receiver, do declare said dividend as payable to the said complainant, and do pay said complainant the amount of such

dividend out of any assets that were in the hands of said receiver on the 15th of March, 1894, or may have come into his hands since the 15th day of March, 1894, after deducting from said assets the costs and expenses of said receivership due on that date or accruing since.

It is further ordered, adjudged and decreed, that the said defendant, as receiver of said First National Bank of Palatka, do file within thirty days, in this cause in this court, an account showing the amount of assets in his hands on the 15th day of March, 1894, and received by him out of the assets of said bank since the 15th day of March, 1894, and the expenditures out of same for the expenses and management of such receivership, as hereinbefore mentioned,
35 and that the amount due to the complainant upon the dividends to it, as a creditor of said bank, upon the basis hereinbefore decreed, shall be paid to said complainant out of such balance of such assets as were in the hands of said receiver on the 15th day of March, 1894, aforesaid, and have been received by him since the 15th of March, 1894.

It is further ordered, that the costs in this cause be paid by the complainant and defendant, each to pay one-half of same.

Done and ordered in open court, this 29th day of January, A. D. 1896.

JAMES W. LOCKE, *Judge.*

(Endorsed:) In the United States circuit court, fifth circuit, in and for southern district of Florida. National Bank of Jacksonville *vs.* T. B. Merrill, as receiver, etc. Filed January 29, 1896. E. O. Locke, clerk. Order, decree.

36 In the Circuit Court of the United States, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B MERRILL, Receiver, Defendant. } In Equity.

Assignment of Error on Appeal.

And now on this 14th day of March, A. D. 1896, comes the defendant, T. B. Merrill, receiver, by Fletcher & Wurts, his solicitors, and says that the decree in said cause is erroneous and against the just rights of said defendant for the following reasons:

First. Because the court erred in rendering the decree overruling the defendant's demurrer to the bill of complainant herein.

Second. Because the court erred in rendering the final decree herein. (*a*) Because the said decree herein requires the defendant to declare and pay dividends, whereas the law does not vest receivers of national banks with authority to either declare or pay dividends. (*b*) Because said final decree requires the defendant to file an account showing the assets in his hands, and his expenditures, which order is beyond the power of said court to enforce.

37 Wherefore the said defendant prays that the said decree be reversed, and that the said court may be directed to enter a decree dismissing said bill.

FLETCHER & WURTS,
Solicitors for Defendant.

(Endorsed:) In circuit court of the United States, southern district of Florida. In equity. National Bank of Jacksonville, complainant, *vs.* T. B. Merrill, receiver, defendant. Assignment of error. Filed March 16, 1896. N. A. Greening, D. C.

In the Circuit Court of the United States for the Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B. MERRILL, Receiver, Defendant. } In Equity.

The above-named defendant, conceiving himself aggrieved by the decree made and entered on the 29th day of January, 1896, in the above-entitled cause, does hereby appeal from said order and decree to the United States circuit court of appeals for the fifth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which
38 said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the fifth circuit.

FLETCHER & WURTS,
Attorneys for Defendant, Jacksonville, Fla.

March 3rd, 1896.

The foregoing claim of appeal is allowed, and the same being taken by order of the Comptroller of the Currency, it is ordered that said appeal shall operate as a supersedeas, without bond.

Done and ordered at chambers, at Key West, Florida, this 14th day of March, A. D. 1896.

JAMES W. LOCKE, *Judge.*

Endorsed: In circuit court of the United States for the southern district of Florida. In equity. The National Bank of Jacksonville, complainant, *vs.* T. B. Merril-, receiver, defendant. Claim of appeal and order. Filed March 16th, 1896. N. A. Greening, D. C.

39 In the United States Circuit Court of Appeals for the Fifth Circuit.

T. B. MERRILL, Receiver, Appellant,
vs.
THE NATIONAL BANK OF JACKSONVILLE, Respondent. } In Equity.

THE UNITED STATES OF AMERICA, *Fifth Judicial Circuit.* } *ss:*

To the National Bank of Jacksonville, a corporation organized and existing under the laws of the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit — of appeals for the fifth circuit, to be holden at the city of New Orleans in said circuit, on the 13th day of April next, pursuant to an appeal allowed herein and filed in the clerk's office of the circuit court of the United States for the southern district of Florida, wherein T. B. Merrill, receiver, is appellant, and you are respondent, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of March, in the year of our
40 Lord one thousand eight hundred and ninety-six.

JAMES W. LOCKE,
U. S. Judge.

(Endorsed:) In the United States circuit court of appeals for the fifth circuit, State of Florida. In equity. T. B. Merrill, receiver, appellant, *vs.* The National Bank of Jacksonville, respondent.

Received this citation at Jacksonville, Fla., on March 17, 1896, and executed it by serving a true copy on W. B. Barnett, president of the National Bank of Jacksonville, at Jacksonville, Fla., on March 18, 1896, and at the same time exhibiting to him the original.

JAMES McKAY,
U. S. Marshal.

March 18, 1896.

United States Circuit Court, Fifth Circuit, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka, Defendant.

I, Eugene O. Locke, clerk of the United States circuit court,
41 fifth judicial circuit, southern district of Florida, do hereby certify that the foregoing pages, numbered from one to thirty

five, both inclusive, *is* a true and correct transcript of the record, assignment of errors, and all proceedings in the above-entitled cause, from the files and records of my office.

Witness my hand and seal of said court, at the city of [SEAL.] Jacksonville, in the district and circuit aforesaid, this 24th day of March, A. D. 1896, and of our Independence the 120th.

EUGENE O. LOCKE, *Clerk.*

(Endorsed:) Filed April 9, 1896. J. M. McKee, clerk.

42 *Proceedings in United States Circuit Court of Appeals, Fifth Circuit.*

November Term, 1895, Monday, June 1st, 1896.

(*Extract from Minutes.*)

T. B. MERRILL, Receiver,
vs.
THE NATIONAL BANK OF JACKSONVILLE.

This cause was regularly called this day and submitted to the court upon briefs of counsel heretofore filed.

November Term, 1895, Monday, June 15th, 1896.

(*Extract from Minutes.*)

T. B. MERRILL, Receiver of the First National Bank of Palatka, Florida,
vs.
THE FIRST NATIONAL BANK OF JACKSONVILLE, FLORIDA.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Florida, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, and this cause remanded to said circuit court with instructions to enter a decree in accordance with the views expressed in the opinion rendered by this court in this cause, the costs of appeal to be paid by the First National Bank of Jacksonville and the costs of the circuit court to be paid by the receiver as part of the expenses of his administration.

JUNE 15, 1896.

43 And afterwards, to wit, on the 16th day of January, 1897, a petition and order allowing appeal was filed in said cause, and is in the words and figures following, to wit:

In the Circuit Court of Appeals for the Fifth Circuit.

THE NATIONAL BANK OF JACKSONVILLE, Appellee,
against
T. B MERRILL, as Receiver, etc., Appellant.

The above-named respondent and appellant, T. B. Merrill, feeling himself aggrieved by the decree of this court of 15th of June, 1896, does hereby appeal to the Supreme Court of the United States from the said decree, and prays that his appeal may be allowed and a citation granted, directed to the appellee, commanding it to appear before the Supreme Court of the United States on the thirtieth day after the allowance of this appeal, and do and receive what may appertain *of* justice to be done in the premises, and that a transcript of the papers used upon the said appeal to the circuit court of appeals, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated twenty-fourth December, 1896.

DUNCAN U. FLETCHER,
Solicitor for said Def't, App'l't.

The foregoing appeal is hereby allowed.
Dated eleventh day of January, 1897.

E. D. WHITE,
Associate Justice.

(Endorsed:) Filed January 16, 1897. J. M. McKee, clerk.

44 *Opinion.*

Filed June 15th, 1896.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

T. B. MERRILL, as Receiver of the First National Bank of Palatka, Appellant,
vs.
THE FIRST NATIONAL BANK OF JACKSONVILLE, Appellee.

Appeal from the United States circuit court, southern district of Florida.

Before Pardee and McCormick, circuit judges, and Speer, district judge.

This was a bill filed by the National Bank of Jacksonville against T. B. Merrill, as receiver of the First National Bank of Palatka, and shows, among other things, that the appellee was a creditor of the First National bank for one class of indebtness, consisting of sundry drafts, amounting to $6,010.47, and for another class of indebtedness, consisting of certificates of deposit, loans, and interest, amounting to $10,093.34, making a total of $16,103.81 due the appellee from the First National Bank of Palatka on the 17th day of July, 1891; that

the appellee held certain collateral to secure the last-mentioned indebtedness, amounting to $10,896.22 according to the face thereof; that the appellee collected a portion of the collateral after insolvency of the bank, leaving a balance due on its said indebtedness so secured by collateral of $4,496.44; that the receiver and comptroller allowed the appellee dividends on this balance and dividends on the unsecured indebtedness, but refused to allow dividends on the total indebtedness from the date of insolvency; that there has been great
delay by said receiver in winding up the matters of said First
45 National Bank of Palatka, and that the receiver has made no
distribution of assets of said bank since the 17th day of May,
1893. The prayer of the bill is "that the defendant may discover the amount of assets of said First National Bank of Palatka that came into his hands and account for the same, and that the defendant may be decreed to pay to your orator (and to all other creditors of said First National Bank of Palatka in like situation who may come in and make themselves parties to this suit and contribute to the expenses thereof) a *pro rata* distribution upon the entire amount of indebtedness due to your orator from the said First National Bank of Palatka, to wit, upon the sum of sixteen thousand one hundred and three and $\frac{81}{100}$ dollars, together with interest thereon from the 17 day of July, A. D. 1891, without deducting therefrom the amount realized from collateral given to secure a portion of said amount due your orator from said bank, as aforesaid.

That the defendant may wind up the affairs of said bank and of his said receivership thereof without further delay.

And that your orator may have such other and further relief in the premises as to your honor may seem meet and the necessities of this case may require and as shall be agreeable to equity."

The receiver demurred to the bill on the following grounds:

"First. That the said bill does not contain any matter of equity whereon this court can ground any decree or give any relief against this defendant.

Second. Because the complainant seeks to make proof of its claim without deducting amounts collected by it from collateral securities prior to making proof, and, further, seeks to compel the defendant to pay it ratably, in proportion with other creditors, on a basis of the gross amount of indebtedness without crediting the collections from said collateral securities.

Third. Because the complainant is estopped in equity
46 from making new proof, having made proof according to
law and receive- dividends upon the basis of said proof.

This demurrer was overruled and the receiver answered as follows:

I.

"That this defendant has never made or declared any dividend to the creditors of the First National Bank of Palatka. On the contrary thereof, this defendant says that he was made receiver of the said bank by appointment of the United States Comptroller of the Currency under section 5234 of the Revised Statutes, and that since

his said appointment he has paid over to said comptroller all moneys derived by him from the assets of the said bank, in accordance with the terms of the said law, and that the appointment of the complainant and the dividend thereunder set forth in the bill of complaint were made by the said comptroller, and this defendant had nothing whatever to do therewith except to transmit to the complainant the checks of the said comptroller representing the said payments, which said payments were made in pursuance of the provisions of section 5236 of the Revised Statutes, and that this defendant has not and cannot have any authority to make disbursements to any of the creditors of the said bank, nor has he in his hands any funds which are available for that purpose. On the contrary thereof, this defendant is charged under the law of his appointment with the duty of transmitting to the comptrolier all moneys realized from the assets of the said bank."

II.

"And, further answering the said bill, this defendant denies that the complainant gave due notice that it would demand a *pro rata* dividend upon the whole amount due to it without deducting the amount collected on collateral security. On the contrary thereof, this defendant avers the fact to be that the complainant accepted the said ruling of the said comptroller without demur and accepted from the said comptroller, through this defendant, without protesting notice of any kind, the checks of the said comptroller in payment of the dividends mentioned in the bill, and that it was not until the 15th of March, 1894, that the complainant gave notice of any kind that it dissented from the said ruling of the comptroller and would demand payment upon a different basis; that since December 1st, 1892, the said comptroller has made disposition of the assets of the said bank in his hands in good faith, believing that the matter of his said ruling was at rest, so that the complainant should now be estopped to demand an apportionment on a different basis."

47

III.

"And, further answering the said bill, this defendant says that he has realized in money from the assets of the said bank the sum of $176,317.91; that under the orders of the said comptroller he has disbursed the sum of $31,561.33 for the expenses of his receivership, 'in which expenses are included moneys paid on decree in litigated case in this court, and for loans paid, etc., amounting to the sum of $17,653.55;' that he has transmitted to the said comptroller, as required by law, the sum of $143,849.03; that there remains in the hands of this defendant the sum of $907.55, which is subject exclusively to the orders of the said comptroller, and that the remaining assets of the said bank consist of sundry parcels of real property and some securities and choses in action, many of which are absolutely worthless and the value of the rest of which cannot be estimated."

IV.

"And, further answering the said bill, this defendant denies that there has been great, or any, delay in winding up the matters of the said bank; on the contrary thereof, the assets of the said bank have been realized upon with the utmost expedition consistent with the character of the same and the great business depression which has existed in Florida since this defendant took charge of the affairs of the said bank. Moreover, this defendant, in all matters concerning the management of the assets of the said bank, has acted strictly in accordance with instructions received from the Comptroller of the Currency."

48 The complainant excepted to this answer as insufficient, but the exceptions were overruled; whereupon the complainant, without replying, set the case for hearing on bill and answer. On the hearing the circuit court rendered a decree as follows:

"It is ordered, adjudged, and decreed that the complainant is entitled to receive from the assets of the said First National Bank of Palatka a distributive share and dividend as one of the creditors of said bank, based upon and to be calculated upon the whole amount of the indebtedness due said complainant from said bank, principle and interest, to wit, upon the basis of the sum of sixteen thousand one hundred and three and eighty-one one-hundredths dollars ($16,103.81) as the amount of the indebtedness due complainant on July 17th, 1891, with interest thereon from July 17th, 1891, and crediting thereon as partial payments the dividends heretofore paid on the dates of their several payments.

It is further ordered, adjudged, and decreed that the said defendant, as receiver, declare the dividend to be due to complainant upon the said basis of its said claim, as above stated, and that said amount of such dividend should be paid out of any assets of the defendant bank which were in the hands of the said defendant, as receiver, on the 15th day of March, 1894, or came into his hands since the said 15th day of March, 1894, after the payment out of such assets of any cost and expenses of such receivership as may have remained unpaid since the 15th day of March, 1894.

It is further ordered, adjudged, and decreed that the said defendant, as such receiver, do declare said dividend as payable to the said complainant and do pay said complainant the amount of such dividend out of any assets that were in the hands of said receiver on the 15th of March, 1894, or may have come into his hands since the 15th day of March, 1894, after deducting from said assets *and* expenses of said receivership due on that date or accruing since.

49 It is further ordered, adjudged, and decreed that the said defendant, as receiver of said First National Bank of Palatka, do file within thirty days, in this cause, in this court, an account showing the amount of assets in his hands on the 15th day of March, 1894, and received by him out of the assets of said bank since the 15th day of March, 1894, and the expenditures out of the same for the expenses and management of such receivership, as hereinbefore mentioned, and that the amount due to the complainant upon the

dividends to it, as a creditor of said bank, upon the basis hereinbefore decreed, shall be paid to said complainant out of such balance of such assets as were in the hands of such receiver on the 15th day of March, 1894, aforesaid, and have been received by him since the 15th of March, 1894."

The receiver, under order from the Comptroller of the Currency, sued out and prosecuted this appeal, assigning as errors:

"First. Because the court erred in rendering the decree overruling the defendant's demurrer to the bill of complaint herein.

Second. Because the court erred in rendering the final decree herein: (*a*) because the said decree herein requires the defendant to declare and pay dividends, whereas the law does not vest receivers of national banks with authority to either declare or pay dividends; (*b*) because said final decree requires the defendant to file an account showing the assets in his hands and his expenditures; which order is beyond the power of said court to enforce."

PARDEE, circuit judge, delivered the opinion of the court:

As this case was heard upon the bill and answer, it follows that all matters well pleaded in the bill and not denied or avoided in the answer, and all matters properly pleaded in the answer, responsive to the bill or in avoidance of the same, are to be taken as true.

Thus considering the bill and answer, the following material facts appear: On the 17th of July, 1891, the First National Bank of Palatka failed, and thereafter the appellant was duly
50 appointed by the Comptroller of the Currency as receiver of said bank and entered upon his duties, taking charge of all the books, notes, accounts, property, and effects of the same. At this — the National Bank of Jacksonville, appellee herein, had two demands against the First National Bank of Palatka; one of these was for sundry drafts, unsecured, for the sum of $6,010.47, and the other was for certificates of deposit, loan and interest, amounting to $10,093.34, and secured by collateral of the face value of $10,896.22. The said bank having tendered proper proof of its said claims, the comptroller allowed the unsecured demand of $6,010.47, but rejected the secured claim, directing the National Bank of Jacksonville to exhaust its collateral given to secure said demand, and then to prove the claim for the difference between the amount of the loan and interest and the amount realized from said collateral.

Upon this ruling by the comptroller the National Bank of Jacksonville proceeded to collect all the productive collateral and credited the same upon the demand, and thereafterwards presented a claim for allowance in the sum of $4,496.44, balance due on the $10,000 demand after applying the proceeds of collateral as collected. This claim was allowed by the comptroller. The National Bank of Jacksonville received dividends from time to time as the same were declared, based upon the unsecured demand and upon the balance of the secured demand as proved. This condition remained until September 11, 1894, when this suit was instituted for the purpose of establishing the claim against the assets of the First

National Bank of Palatka in favor of the National Bank of Jacksonville for the full amount of the secured debt as it existed at the time the receiver was appointed, without regard to the collateral, which was subsequently collected.

On this state of facts the unsecured claim for $6,010.47, which was allowed upon presentation and upon which dividends have since been paid and accepted, may be left out of consideration, and the main question in this case is, Had the National Bank of
51 Jacksonville the right to prove up the full amount of its $10,000 claim, although secured by collateral, and receive dividends on the full amount thereof without reference to the amounts that might be subsequently collected on such collateral and applied on the same claim?

The precise question was adjudicated in the case of Armstrong *v.* Chemical National Bank, 16 U. S. App., 465, where nearly all the adjudged cases are reviewed and the question is discussed on principle. In that case it was held that "the creditors of an insolvent national bank in proving their claims cannot be required to allow any credit for collection from collateral made subsequent to the declared insolvency of the bank and before the filing of the proof of claim."

From an examination of many of the cases cited and reviewed in Armstrong *vs.* Chemical National Bank, *supra*, as well as a consideration of the reasoning therein, we are compelled to concur with the rule as declared in that case, and therefore we hold in the instant case that when the National Bank of Jacksonville presented to the receiver the proof of its secured debt as it was on the day the First National Bank of Palatka failed, said proof should have been received and the claim allowed without reference to the collateral held to secure the said claim, and that the said National Bank of Jacksonville is now entitled to have the claim adjudicated by proper decree in this case, and to be decreed to have such relief as the circumstances of the case and jurisdiction of the court will permit.

The appellant complains of the form of the decree appealed from and strongly objects that certain relief therein granted was beyond the power of the court and not warranted by the facts in the case. It is objected that the appellant, as receiver, has no authority to declare any dividend payable to complainant or to pay the complainant any dividends out of any assets that were in the hands of the receiver on March 15, 1894, or may hereafter come into his hands since the 15th day of March, 1894, because, he says, under the
52 laws of the United States he is compelled to pay all moneys collected by him as receiver into the Treasury of the United States, subject to the order of the Comptroller of the Currency, and that by the same laws the Comptroller of the Currency is alone authorized to declare and pay dividends. Section 5234 of the Revised Statutes of the United States provides for the appointment and duties of receivers of national banks, and thereunder receivers are appointed by the Comptroller of the Currency, and they are under the direction of the *the* Comptroller and are required to pay over all money made out of the assets of the insolvent bank to the Treasury

of the United States, subject to the order of the comptroller, and also make report to the comptroller of all other acts and proceedings.

Section 5236 of the Revised Statutes of the United States provides as follows:

"From time to time, after full *full* provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Under these statutes it seems clear that the assets of an insolvent national bank, when collected by the receiver, are entirely within the control and disposition of the Comptroller of the Currency, and that the receiver is without power in respects to the payment of dividends.

Numerous authorities have been cited by the counsel for appellee to the effect that the title to the assets of an insolvent national bank is transferred to the receiver. Richmond *v.* Irons, 121 U. S., 27; National Bank *vs.* Colby, 21 Wall., 609; Pacific National Bank *vs.* Mixter, 124 U. S., 724; Scott — Armstrong. 146 U. S., 499;
53 Armstrong *vs.* American Exchange National Bank, 133 U. S., 433. In this last-mentioned case it appears that a decree directing the receiver to allow the claim for the full amount against the assets in his hands as receiver, and to satisfy it by paying such dividends as he had made theretofore and as should be made thereafter from the assets of the Fidelity bank in the due course of administration, and to pay the defendany twenty-five per cent. already declared, with interest, etc., was confirmed by the Supreme Court.

In none of the cases cited does it appear that the precise question was considered. In general the receiver of a national bank has been held to be a mere instrument of the comptroller and subject in all respects to his instruction. Kennedy *vs.* Gibson *et als.*, 8 Wall., 498; Bank — Kennedy, 17 Wall., 21.

In Eastern Townships Bank *vs.* Vermont National Bank, 22 Fed. Rep., 186, the proper form of a decree in a case similar to the one in hand was considered in reference to section 5236, Revised Statutes, and Case *vs.* Bank, 100 U. S., 446. It was held that judgments in such cases should be certified by the receiver through the comptroller and be paid in due course of administration. In Case *vs.* Bank, *supra*, the judgment was, after reciting the amount of the demand, etc., as follows: "That Frank F. Case, receiver, do recognize the said Citizens' Bank of Louisiana as creditor, * * * and that he do pay the same or certify the same to the comptroller, to be paid in due course of administration, * * * and that the Citizens' Bank of Louisiana do receive, before further payment to creditors,

its due proportion of dividends *pro rata* with those already paid to the creditors of the Crescent City National bank." In this case it does not appear that the form of the judgment was contested, but in affirming the judgment the court did say: "Beyond all doubt, the validity of their debt is established by the verdict and judgment, and if so it requires neither argument nor authorities to show that the order given by the circuit court to provide for the payment of the amount recovered was proper and correct." *Ib.*, 456.

In the absence to the contrary by the Supreme Court of
54 the United States, the law as declared in the statute above quoted should prevail.

Appellant further objects that the court was without authority on the pleadings and facts to decree that the receiver should account to the court in the instant case as to the assets of the First National Bank of Palatka received and collected by him and his expenditures out of the same for the expenses and management of the receivership.

The appellant contends that the case made does not warrant any such accounting as is decreed; that the case was heard on bill and answer, and that the answer, which is admitted to be true, shows the amounts that the receiver had received and disbursed.

The appellee had a right to resort to the court to have his claim adjudicated when it was refused by the comptroller, but it is very doubtful whether, on the case made by the bill and answer, if in any case the receiver in a suit in which the comptroller is not a party can be made to account for an administration of which the comptroller is solely responsible.

As we view the equities involved, a decree to the effect that on the 1st day of July, 1891, the First National Bank of Palatka was indebted to the National Bank of Jacksonville on a certificate of deposit secured by collateral in the sum of $10,093.34; which indebtedness was duly proved and should have been allowed and dividends paid thereon; that said indebtedness is now allowed as of the date of July 1st, 1891, and that the National Bank of Jacksonville be paid dividends on such indebtedness as have been allowed and paid on other indebtedness of said First National Bank of Palatka, with eight per cent. interest on such dividends from the date of declaration thereof, less a credit of the sums heretofore paid as dividends on that part of said claim heretofore allowed: Provided, however, that the dividends heretofore paid and hereafter to be paid on said sum of $10,093.34, together with the amounts heretofore and hereafter received on the collaterals securing said indebtedness, shall not exceed one hundred cents on the dollar on
55 the principle and interest on said debt; that T. B. Merrill, receiver, do recognize the said National Bank of Jacksonville as a creditor of the First National Bank of Palatka in the said sum of $10,093.34, as of date July 17th, 1891; that he do pay the same or certify the same to the Comptroller of the Currency to be paid in due course of administration, and that the said National Bank of Jacksonville do receive, before further payment to creditors, its due proportion of dividends, as hereinbefore declared, with interest

thereon, with those already paid to the other creditors of the First National Bank of Palatka; will protect the rights of the National Bank of Jacksonville as fully as the nature of the case and the jurisdiction of the court will permit, particularly in view of the conduct of the said bank in proving up part of its said claim, in accepting dividends on such part, and in delaying to bring this suit until after large dividends had been declared and paid to the other creditors.

The decree of the circuit court is reversed and the cause is remanded, with instructions to enter a decree in accordance with the views herein expressed; the cost of appeal to be paid by the National Bank of Jacksonville and the costs of the circuit court by the receiver as a part of the expenses of his administration.

June 15, 1896.

56 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing fifty-six pages, numbered from *a* to 55, inclusive, contain a true copy of the record, pleas, process, and proceedings in the case of T. B. Merrill, receiver, appellant, *v.* The National Bank of Jacksonville, appellee, No. 486, as the same remains on the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 28 day of January, A. D. 1897.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

57 UNITED STATES OF AMERICA, *ss:*

To the National Bank of Jacksonville, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein T. B. Merrill is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this eleventh day of January, in the year of our Lord one thousand eight hundred and ninety-seven.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

58 On this 14th day of January, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared Frank Drew before me, the subscriber, a notary public in and for the State of Florida at large, duly commissioned and authorized, and makes oath that he delivered a true copy of the within citation to William B. Barnett, as and who is the president of the said National Bank of Jacksonville, at Jacksonville, in the county of Duval and State of Florida.

FRANK DREW.

Sworn to and subscribed the 14th day of January, A. D. 1897.

[Seal of John W. Dodge, Notary Public, State of Florida.]

JNO. W. DODGE,
Notary Public, State of Florida at Large.

Endorsed on cover: Case No. 16,486. U. S. C. C. of appeals, 5th circuit. Term No., 300. T. B. Merrill, as receiver of the First National Bank of Palatka, appellant, *vs.* The National Bank of Jacksonville. Filed February 6, 1897.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 304 55.

T. B. MERRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF PALATKA, APPELLANT,

vs.

THE NATIONAL BANK OF JACKSONVILLE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED FEBRUARY 6, 1897.

(16,487.)

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(16,487.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 301.

T. B. MERRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF PALATKA, APPELLANT,

vs.

THE NATIONAL BANK OF JACKSONVILLE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a United States Circuit Court of Appeals, Fifth Circuit, November Term, 1896.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun, pursuant to law, on the third Monday of November, 1896, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit, and the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable T. S. Maxey, United States district judge for the western district of Texas.

T. B. MERRILL, Receiver, Appellant,
vs.
THE NATIONAL BANK OF JACKSONVILLE, Appellee. } No. 542.

Be it remembered that heretofore, to wit, on the 23rd day of October, 1896, a transcript of the record of the above-styled cause from the circuit court of the United States for the southern district of Florida was filed in the office of the clerk of the United States circuit court of appeals for the fifth circuit in the words and figures following, to wit:

1 In United States Circuit Court, Fifth Circuit, in and for the Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka, Defendant. } In Chancery.

Bill.

The National Bank of Jacksonville, a corporation under the laws of the United States of America, and having its place of business at Jacksonville, Florida, brings this its bill of complaint, for itself and all other persons in like situation, who shall come in and make themselves parties to this suit, and contribute to the expenses thereof, against T. B. Merrill, as receiver of the First National Bank of Palatka, a corporation under the laws of the United States of America, and heretofore doing business at Palatka, in the State of Florida.

And thereupon, your orator complains and says as follows: That your orator is a corporation under the laws of the United States of America, and having its place of business at Jacksonville, in the State of Florida, where it was at the times hereinafter mentioned, and is now engaged in conducting the business of a national bank.

2 That the First National Bank of Palatka is a corporation under the laws of the United States of America, having its

place of business at Palatka, Florida, where, prior to the 17th day of July, A. D. 1891, it was engaged in conducting the business of a national bank.

That on the 17th day of July, A. D. 1891, the said First National Bank of Palatka failed, and closed its doors, and the Hon. E. S. Lacy, as comptroller of the United States of America, subsequent to said last-mentioned date, appointed this defendant, to wit: the said T. B. Merrill, as receiver of the First National Bank of Palatka, and the said receiver took charge of the said banking business, theretofore conducted by said First National Bank of Palatka, and all of the books, notes, accounts, property and effects of said First National Bank of Palatka.

That this court has jurisdiction of the parties to and their subject-matter to this suit; that this is a suit of a civil nature in equity; that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arises under the laws of the United States of America.

That at the time of the failure of the First National Bank of Palatka it was indebted to your orator for sundry drafts of said bank to the order of your orator on the Hanover National Bank of New York, amounting, with *with* fees, to $6,010.47 (six thousand and ten and $\frac{47}{100}$ dollars), which said indebtedness was unsecured by collateral.

And said First National Bank of Palatka was further indebted to your orator at the time of its failure in the sum of ten thou-
3 sand dollars ($10,000.00), and interest, for a loan made said bank by your orator on June 5th, A. D. 1891; that at the time said loan was made the said First National Bank of Palatka delivered to your orator their time certificate of deposit, No. 6120, due in sixty days from date, bearing interest at eight per cent., to which said bank attached, as collateral security, sundry notes belonging to said First National Bank of Palatka, to wit:

St. James on Gulf	$1,000 00
R. H. Mason	250 00
T. V. Hinks	300 00
G. U. Beach	300 00
G. U. Beach	2,000 00
The Florida Commercial Co	396 90
A. B. Mason	1,300 00
A. L. Hart	5,350 22
Total	$10,896 22

The total indebtedness due to your orator from the First National Bank of Palatka on the day of its failure was:

For sundry drafts	$6,010 47
For certificate of deposit, loan and interest	10,093 34
Total amount due	$16,103 81

Making a total of sixteen thousand, one hundred and three and $\frac{81}{100}$ dollars ($16,103.81) due to your orator from the First National Bank of Palatka on the 17th day of July, A. D. 1891.

4 That your orator proved its claim, in due form of law, before said receiver aforesaid, for six thousand and ten and $\frac{47}{100}$ dollars, being amount of drafts due to your orator from said First National Bank of Palatka, and upon which said amount so proven your orator has received distributions as follows:

December 10th, 1892, 35 %	$2,103 67
May 17th, 1893, 10 %	601 05
Total	$2,704 72

That in addition to proving the amount of $6,010.47 due on sundry drafts aforesaid, your orator offered to prove up its claim for $10,000.00, being amount of certificate of deposit secured by collateral, as aforesaid, but the said defendant receiver would not permit your orator to prove the total amount of $10,000.00 and interest due thereon for said loan as aforesaid, but under the ruling of the comptroller of the United States of America, your orator was not allowed to prove its claim in full before the defendant receiver, but was ordered to first exhaust the collateral given to secure said loan for $10,000.00, as aforesaid, and then to prove the claim for the difference between the amount of the loan and interest, and the amount realized from said collateral.

Under the ruling of the comptroller your orator collected all of the notes given as collateral to secure said loan of $10,000.00, except the note of H. L. Hart, for five thousand three hundred and fifty and $\frac{72}{100}$ dollars; which last-mentioned note was placed in judgment, and which judgment was non-productive, and which

5 said judgment has been assigned and transferred by your orator to the defendant herein as receiver, as aforesaid.

That after exhausting the collateral your orator proved its claim for the balance due on said certificate of deposit for $10,000.00, so secured by said collateral, as aforesaid, to wit: for the sum of four thousand four hundred and ninety-six and $\frac{44}{100}$ dollars, upon which said balance of $4,496.44 your orator has received the following dividends from the defendant receiver, to wit:

December 1st, 1892	$1,573 75
May 17th, 1893	449 64
Total	$2,033 39

That the defendant should have allowed your orator to have proven its entire claim of $16,103.81, and to have received *pro rata* dividends upon the entire amount thereof.

That your orator is informed and believes, and upon such information and belief so charges the truth to be, that the same rule was applied as to other creditors of the said First National Bank of Palatka, and that it was an erroneous and illegal manner of de-

claring a dividend. That your orator gave due notice that it would demand a *pro rata* dividend upon the whole amount due your orator, without deducting the amount collected on collateral security, to wit: that it would demand a *pro rata* dividend upon $16,103.81, and interest thereon from the 17th day of July, A. D. 1891.

That your orator does not know, without a discovery, what amount of assets the defendant, as such receiver, did receive, and what disposition he made of them, or what amount your
6 orator is justly entitled to receive under the distribution by the receiver herein, and that an accounting is necessary to ascertain the same.

That there has been great delay in winding up the matters of said First National Bank of Palatka by said receiver.

That the defendant has made no distribution of the assets of said bank since the 17th day of May, A. D. 1893.

All of which actings and doing are contrary to equity. To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby and herein prayed; and may, upon his corporal oath, and according to the utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters herein set forth, as if particularly interrogated thereunto.

And your orator prays as follows:

That the defendant may discover the amount of assets of said First National Bank of Palatka that came into his hands, and account for the same, and that the defendant may be decreed to pay to your orator (and to all other creditors of said First National Bank of Palatka in like situation, who may come in and make themselves parties to this suit, and contribute to the expenses thereof) a *pro rata* distribution upon the entire amount of indebtedness due to your orator from the said First National Bank of Palatka, to wit: upon the sum of sixteen thousand one hundred and three and $\frac{81}{100}$ dollars, together with interest thereon from the 17th day of July, A. D. 1891, without deducting therefrom the amount
7 realized from collateral given to secure a portion of said amount due your orator from said bank as aforesaid.

That the defendant may wind up the affairs of said bank and of his said receivership thereof, without further delay.

And that your orator may have such other and further relief in the premises as to your honor may seem meet, and the necessities of this case may require, and as shall be agreeable to equity.

May it please your honor to grant unto your orator the writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, to be directed to the defendant, T. B. Merrill, as receiver of the First National Bank of Palatka, a corporation incorporated under the laws of the United States of America, commanding him, at a certain time, and under a certain penalty, to be therein limited, personally to be and appear before this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to

stand to, perform and abide such further order, direction and decree herein as to this honorable court may seem meet.

COOPER & COOPER,
Solicitors for Complainant.

(Endorsed:) In United States circuit court, fifth circuit, in and for southern district of Florida. In chancery. National Bank of Jacksonville *vs.* T. B. Merrill, receiver. Filed Sept. 11, 1894. E. O. Locke, clerk. Bill. Cooper & Cooper, solicitors for complainant.

8 UNITED STATES OF AMERICA, }
Southern District of Florida. }

The President of the United States of America to T. B. Merrill, as receiver of the First National Bank of Palatka, a corporation incorporated under the laws of the United States of America:

We command you, and every one of you, that you appear before the judges of the circuit court of the United States of America, for the fifth circuit and southern district of Florida, at Jacksonville, in said district, on the first Monday, being the fifth day of November next, to answer to a bill of complaint exhibited against you by the National Bank of Jacksonville, a corporation under the laws of the United States of America, and having its place of business at Jacksonville, Florida, and filed in the clerk's office of said court, and then and there to receive and abide by such judgment and decree as said court shall have considered in this behalf. And this you are not to omit, upon pain of judgment by default being pronounced against you.

To the marshal of the United States to execute and return.

9 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of
[SEAL.] this court, at the city of Jacksonville in said district, this eleventh day of September, A. D. 1894.

E. O. LOCKE, *Clerk*,
By N. A. GREENING, *D. C.*

COOPER & COOPER,
Solicitors for Complainant.

Memorandum.

The above-named defendant is notified that unless he shall enter his appearance in the clerk's office of said court, at Jack-
[SEAL.] sonville aforesaid, on or before the day to which the above is returnable, the complaint will be taken against him as confessed, and a decree entered accordingly.

E. O. LOCKE, *Clerk*,
By N. A. GREENING, *D. C.*

Received the within writ on the 11th day of September, A. D. 1894, at Jacksonville, Florida, and executed the same by delivering a true copy hereof to T. B. Merrill, as receiver of the First National

Bank of Palatka, at the same time exhibiting to him this original, at Palatka, Florida, on September 14th, A. D. 1894.

JAMES McKAY,
U. S. Marshal.

10 No. 112. Circuit court United States, southern district of Florida. The National Bank of Jacksonville *vs.* T. B. Merrill, receiver. Chancery subpœna. Returnable to rule day, first Monday in November, A. D. 1894. E. O. Locke, clerk, by N. A. Greening, D. C. Filed September 14, A. D. 1894. E. O. Locke, clerk. Cooper & Cooper, complainant's solicitors.

11 In the United States Circuit Court, Fifth Judicial Circuit, in and for the Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, a Corporation under the Laws of the United States of America, Complainant,
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka, a Corporation under the Laws of the United States of America, Defendant.
} In Chancery.

Now comes the complainant in the above-stated cause, by Cooper & Cooper, its solicitors, on this the rule day in November, 1894, being the rule day next succeeding the appearance day in said cause, and the said defendant above named in above-entitled cause having failed to file plea, demurrer or answer to complainant's said bill of complaint, on the said rule day, and the said defendant aforesaid being in default thereof, the said complainant now elects to enter its order (as of course) in the order book that its bill be taken *pro confesso*, and the said complainant does now enter said order that its said bill and all its allegations be taken as confessed by the said defendant above named in above-stated cause.

Let the defendant aforesaid take notice that as of its right the complainant will proceed *ex parte* in said cause.

COOPER & COOPER,
Solicitors for Complainant.

12 The clerk of said above-named court will please enter the above order in the order book.

COOPER & COOPER,
Solicitors for Complainant.

(Endorsed:) In the United States circuit court, fifth judicial circuit, in and for the southern district of Florida. In chancery. National Bank of Jacksonville, complainant, *vs.* T. B. Merrill, receiver, defendant. Order taking bill *pro confesso* and præcipe for entry of same. Filed Nov. 5, 1894. E. O. Locke, clerk. Cooper & Cooper, solicitors for complainant.

In the Circuit Court of the United States, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka. } In Chancery.

The demurrer of T. B. Merrill, as receiver of the First National Bank of Palatka, to the bill of complaint of The National Bank of Jacksonville, the above-named plaintiff.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is herein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth—

13 First. That the said bill does not contain any matter of equity whereon this court can ground any decree or give any relief against this defendant.

Second. Because the complainant seeks to make proof of its claim without deducting amounts collected by it from collateral securities prior to making proof, and further seeks to compel the defendant to pay it ratably in proportion with other creditors on a basis of the gross amount of indebtedness without crediting the collections from said collateral securities.

Third. Because the complainant is estopped in equity from making new proof, having made proof according to law and received dividends upon the basis of the said proof.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

JOHN WURTS AND
E. E. HASKELL,
Counsel for Defendant.

14 STATE OF FLORIDA, }
County of Putnam. }

Personally appeared before me this day T. B. Merrill, who being first duly sworn, says that he is the defendant who files the foregoing demurrer and that the same is not interposed for delay.

T. B. MERRILL.

Sworn to and subscribed before me this 22d day of November, 1894.

COOK CARLETON,
[SEAL.] *Notary Public, State of Florida at Large.*

In my opinion the foregoing demurrer is well founded in point of law.

JOHN WURTS,
E. E. HASKELL,
Of Counsel for the Defendant.

(Endorsed:) In circuit court of U. S., sou. dist. of Florida. In chancery. Nat. Bank of Jac. *vs.* T. B. Merrill. Demurrer. Filed Nov. 26, 1894. E. O. Locke, clerk. Overruled June 26, 1895. E. O. Locke, clerk.

15 In United States Circuit Court, Fifth Circuit, in and for the Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka, Defendant. } In Chancery.

Now on this day comes the complainant in the above-stated cause and sets down for argument on the 7th day of January, A. D. 1895, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, the demurrer of the defendant to the bill of complaint in the said above-entitled cause.

COOPER & COOPER,
Solicitors and of Counsel for Complainant.

(Endorsed:) In United States circuit court, fifth circuit, in and for southern district of Florida. In chancery. National Bank of Jacksonville *vs.* T. B. Merrill, as receiver. Filed January 7, 1895. E. O. Locke, clerk. Setting down of demurrer. Cooper & Cooper, solicitors for complainants.

16 In U. S. Circuit Court, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver, &c.

This cause coming on to be heard on the demurrer of defendant to the bill and having been argued by counsel, it is ordered and adjudged that said demurrer be and same is hereby overruled, and defendant given until rule day in August, 1895.

June 25, 1895.

JAMES W. LOCKE, *Judge.*

(Endorsed:) National Bank of Jacksonville *vs.* T. B. Merrill, receiver. Decree overruling demurrer. Filed June 26, 1895. E. O. Locke, clerk.

17 In the Circuit Court of the United States, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver, etc. } In Chancery.

The answer of T. B. Merrill, as receiver of the First National Bank of Palatka, the defendant, to the bill of complaint of The National Bank of Jacksonville, the complainant.

This defendant, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering says:

I.

That this defendant has never made or declared any dividend to the creditors of the First National Bank of Palatka; on the contrary thereof, this defendant says that he was made receiver of the said bank by appointment of the United States Comptroller of the Currency under section 5234 of the Revised Statutes, and that since his said appointment he has paid over to the said comptroller all moneys derived by him from the assets of the said bank in accordance with the terms of the said law, and that the *appointment* to the
18 complainant and the dividend thereunder set forth in the bill of complaint were made by the said comptroller, and this defendant had nothing whatever to do therewith, except to transmit to the complainant the checks of the said comptroller representing the said payments, which said payments were made in pursuance of the provisions of section 5236 of the Revised Statutes, and that this defendant has not, and cannot have any authority to make disbursements to any of the creditors of the said bank, nor has he in his hands any funds which are available for that purpose; on the contrary thereof this defendant is charged under the law of his appointment with the duty of transmitting to the comptroller all moneys realized from the assets of the said bank.

II.

And further answering the said bill this defendant denies that the complainant gave due notice that it would demand a *pro rata* dividend upon the whole amount due to it without deducting the amount collected on collateral security; on the contrary thereof this defendant avers the fact to be that the complainant accepted the said ruling of the said comptroller without demur and accepted from the said comptroller, through this defendant, without protesting notice of any kind, the checks of the said comptroller in payment of the dividends mentioned in the bill, and that it was not until the 15th of March, 1894, that the complainant gave notice of any kind that it dissented from the said ruling of the comptroller

and would demand payment upon a different basis; that since December 1st, 1892, the said comptroller has made disposition of the assets of the said bank in his hands in good faith, believing
19 that the matter of his said ruling was at rest; so that the complainant should now be estopped to demand an apportionment on a different basis.

III.

And further answering the said bill this defendant says that he has realized in money from the assets of the said bank the sum of $176,317.91; that under the orders of the said comptroller he has disbursed the sum of $31,561.33 for the expenses of his receivership, "in which expenses are included moneys paid on decree in litigated case in this court, and for loans paid, etc., amounting to the sum of $17,653.55;" that he has transmitted to the said comptroller, as required by law, the sum of $143,849.03; that there remains in the hands of this defendant the sum of $907.55, which is subject exclusively to the orders of the said comptroller, and that the remaining assets of the said bank consist of sundry parcels of real property and some securities and choses in action, many of which are absolutely worthless, and the value of the rest of which cannot be estimated.

IV.

And further answering the said bill this defendant denies that there has been great, or any, delay in winding up the matters of the said bank; on the contrary thereof, the assets of the said bank have been realized upon with the utmost expedition consistent with the character of the same, and the great business depression which has existed in Florida since this defendant took charge of the affairs of the said bank. Moreover, this defendant, in all matters concerning the management of the assets of the said bank, has acted
20 strictly in accordance with instructions received from the Comptroller of the Currency.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged; without this, that there is any other matter, cause, or thing, in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true, to the knowledge or belief of this defendant; all of which matters and things this defendant is willing and ready to aver and prove as this honorable court shall direct; and humbly prays to be hence discharged with his reasonable costs and charges, in this behalf most wrongfully sustained.

T. B. MERRILL,
Receiver of the First National Bank of Palatka.

FLETCHER & WURTS AND
E. E. HASKELL,
Defendant's Counsel.

STATE OF FLORIDA, }
County of Putnam. }

Personally appeared before me this day T. B. Merrill, who, being first duly sworn, says that he is the defendant who files the foregoing answer; that he has read the said answer, and knows the statements therein made, and that the same are true in so far as they are alleged as true; and in so far as they are alleged on
21 information and belief, he is informed that they are true, and he believes them to be true.

T. B. MERRILL.

Sworn to and subscribed before me this 18th day of July, 1895.
[SEAL.] D. M. KIRBY,
Notary Public.

(Endorsed:) In circuit court of United States, southern district of Florida. In chancery. National Bank of Jacksonville *vs.* T. B. Merrill, receiver. Answer. Filed Aug. 5th, 1895. N. A. Greening, D. C. Fletcher & Wurts, attorneys for defendant.

In United States Circuit Court, Fifth Circuit, in and for Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, a Corporation under the Laws of the United States of America, Complainant,
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka, Defendant. } In Chancery.

Exceptions Taken by the Above-named Complainant to the Answer of the Defendant for Insufficiency.

22 First exception. For that the defendant has not, to the best and utmost of his knowledge, remembrance, information and belief answered and set forth whether the complainant is a corporation under the laws of the United States of America, and having its place of business at Jacksonville, in the State of Florida, and as to whether or not it was at the times mentioned in the bill of complaint, and is now engaged in conducting the business of a national bank.

Second exception. For that the defendant has not, to the best and utmost of his knowledge, remembrance, information, and belief, answered and set forth whether the First National Bank of Palatka is a corporation under the laws of the United States of America, having its place of business at Palatka, Florida, where, prior to the 17th day of July, A. D. 1891, it was engaged in conducting the business of a national bank.

Third exception. For that the defendant has not, to the best and utmost of his knowledge, remembrance, information and belief, answered and set forth whether, on the 17th day of July, A. D. 1891,

the said First National Bank of Palatka, failed, and closed its doors, and whether the Hon. E. S. Lacy, as comptroller of the United States of America, subsequent to said last-mentioned date, appointed this defendant, to wit: the said T. B. Merrill, as receiver of the First National Bank of Palatka, and whether or not the said receiver took charge of the said banking business theretofore conducted by said First National Bank of Palatka, and all of the books, notes, accounts, property and effects of said First National Bank of Palatka.

23 Fourth exception. For that the defendant has not, to the best and utmost of his knowledge, remembrance, information and belief, answered and set forth whether this court has jurisdiction of the parties and the subject-matter of this suit, and whether this is a suit of a civil nature in equity, and whether or not the matter in dispute exceeds, exclusive of interest and cost, the sum or value of two thousand dollars, and whether or not the same arises under the laws of the United States of America.

Fifth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether, at the time of the failure of the First National Bank of Palatka, it was indebted to your orator, the complainant herein, for sundry drafts of said bank, to the order of your orator, on the Hanover National Bank of New York, amounting, with fees, to $6,010.47, and whether or not said indebtedness was unsecured by collateral.

Sixth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether the First National Bank of Palatka was further indebted to your orator, the complainant herein, at the time of its failure, in the sum of $10,000.00, and interest, for a loan made said bank by your orator, on June 5th, 1891, and whether, at the time *of* said loan was made the said First National Bank of Palatka delivered to your orator their time certificate of deposit, No. 6120, due sixty days from date, bearing interest

24 at eight per cent., to which said bank attached, as collateral security, sundry notes belonging to said First National Bank of Palatka, to wit:

St. James on Gulf	$1,000 00
R. H. Mason	250 00
T. V. Hinks	300 00
G. U. Beach	300 00
G. U. Beach	2,000 00
The Florida Commercial Co.	396 90
A. B. Mason	1,300 00
A. L. Hart	5,350 22
Total	$10,896 22

Seventh exception. For that the defendant has not, in manner aforesaid, answered and set forth whether the total indebtedness due to your orator, the complainant in this cause, from the First National Bank of Palatka, on the day of its failure, was:

For sundry drafts ...	$6,010 47
For certificate of deposit, loan and interest	10,093 34
Total amount due	$16,103 81

Making a total of $16,103.81 due to your orator from the First National Bank of Palatka on the 17th day of July, A. D. 1891.

Eighth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether your orator proved its claim in the due form of law before said receiver aforesaid, for $6,010.47, being amount of drafts due to your orator from
25 said First National Bank of Palatka, and whether, upon which said amount so proven, your orator has received distribution, as follows:

December 10, 1892, 35%	$2,103 67
May 17th, 1893, 10%	601 05
Total	$2,704 72

Ninth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether, in addition to proving the amount of $6,010.47 due on sundry drafts as aforesaid, your orator offered to prove up its claim for $10,000.00, being amount of certificate of deposit secured by collateral as aforesaid, and whether the said receiver would not permit your orator to prove the total amount of $10,000.00 and interest due thereon for said loan, as aforesaid, and whether, under the ruling of the comptroller of the United States of America, your orator was not allowed to prove its claim in full before the defendant receiver, and whether it was ordered to first exhaust the collateral given to secure said loan for $10,000.00, as aforesaid, and then to prove the claim for the difference between the amount of the loan and interest and the amount realized from said collateral.

Tenth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether, under the ruling of the comptroller, your orator collected all of the notes given as collateral to secure said loan of $10,000.00, except the note of H. L. Hart, for $5,350.22, and whether said last-mentioned note was placed in judgment; and whether said judgment was non-productive, and whether said judgment has been assigned and transferred by your orator to the defendant herein, as receiver, as aforesaid.

26 Eleventh exception. For that the defendant has not, in manner aforesaid, answered and set forth whether, after exhausting the collateral, your orator proved its claim for the balance due on said certificate of deposit for $10,000.00, so secured by said collateral as aforesaid, to wit: for the sum of $4,496.44, and whether, upon said balance of $4,496.44, your orator has received the following dividends from the defendant receiver, to wit:

December 1st, 1892	$1,573 75
May 17th, 1893	449 64
Total	$2,033 39

Twelfth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether the defendant should have allowed your orator to have proven its entire claim of $16,103.81, and to have received *pro rata* dividends upon the entire amount thereof.

Thirteenth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether the same rule was applied as to other creditors of the said First National Bank of Palatka, and whether it was an illegal and erroneous manner of declaring a dividend.

Fourteenth exception. For that the defendant has not, in manner aforesaid, answered and set forth what amount of assets the defendant, as such receiver, did receive, and what disposition he made of them, or what amount your orator is justly to receive under the distribution by the receiver herein, and whether an accounting is necessary to ascertain the same.

27 Fifteenth exception. For that the defendant has not, in manner aforesaid, answered and set forth whether the defendant has made distribution of the assets of said bank since the 17th day of May, A. D. 1893.

Sixteenth exception. For that the defendant has not, in manner aforesaid, discovered the amount of assets of said First National Bank of Palatka, that came into his hands, and accounted for the same.

The said portion of defendant's answer, purporting to be an answer thereto, being in words and figures as follows:

"III.

"And further answering the said bill, this defendant says that he has realized in money from the assets of the said bank the sum of $176,317.91; that under the order of the said comptroller he has disbursed the sum of $31,561¾, for the expenses of his receivership," in which expenses are included moneys paid on decree in litigated case in this court, and for loans paid, etc., amounting to sum of $17,653.55; that he has transmitted to the said comptroller, as required by law, the sum of $143,849.03; that there remains in the hands of this defendant the sum of $907.55, which is subject exclusively to the orders of the said comptroller; and that the remaining assets of the said bank consists of sundry parcels of real property and some securities and choses in action, many of which are absolutely worthless, and the value of the rest of which cannot be estimated."

In all which particulars the complainant excepts to the answer of the defendant, T. B. Merrill, as receiver of the First National
28 Bank of Palatka, as evasive, imperfect and insufficient, and prays that the defendant may be compelled to put in a full and sufficient answer thereto.

Seventeenth exception. This complainant further excepts to so much of the complainant's answer as is contained in the second paragraph thereof, commencing with the words, "on the contrary

thereof," and ending with the words, "upon a different basis," on the grounds that the same constitutes no defence, and upon the ground that even admitting the allegation of the answer to be true, same would have no bearing upon the fund undisbursed, in this trust matter, and that the same is impertinent.

Eighteenth exception. The complainant further excepts to so much of the second paragraph of defendant's answer as is contained therein, commencing with the words, "that since December 1st, 1892," and ending with the words, "was at rest," and to so much of the second paragraph in the said answer, commencing with the words, "so that," and ending with the words "basis," at the end of said second paragraph, on the grounds that the same constitutes no defence, and on the further grounds that, admitting the same to be true, same would have no bearing upon the fund undistributed, and that the same is impertinent.

Nineteenth exception. The complainant further excepts to so much of the said answer as is contained in the third paragraph of defendant's said answer, on the ground that the same is not a full and complete discovery of the assets of said bank received by said receiver; that the same is not responsive to the allegations of the bill; is vague, and indefinite, and impertinent.

29 Twentieth exception. This complainant further excepts to so much of the fourth paragraph of the defendant's answer commencing with the words, "Moreover, this defendant," and ending with the word, "currency," at end of said paragraph, on the grounds that the same is not responsive to the allegations of the bill, and that the same constitutes non-defence to the bill, and is impertinent. In all which particulars the complainant excepts to the said answer as impertinent and insufficient, and insists that the same ought to be expunged from said answer.

JOHN C. COOPER,
Solicitor for Complainant.

(Endorsed:) In United States circuit —, fifth circuit, in and for southern district of Florida. In chancery. National Bank of Jacksonville *vs.* T. B. Merrill, receiver. Filed this 2d day of Sept., A. D. 1895. E. O. Locke, clerk. Exceptions to answer. Cooper & Cooper.

30 In United States Circuit Court, Fifth Circuit, in and for the Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka, Defendant. } In Chancery.

Now, on this the rule day in October, A. D. 1895, comes the complainant in the above-stated cause, and sets down for argument before his honor the judge of the above-stated court, on Monday, November 4th, A. D. 1895, at 10 o'clock a. m., or as soon thereafter

as counsel can be heard, the exceptions filed on the 2d day of September, A. D. 1895, to the answer of the defendant to the bill of complaint in the above-stated cause.

J. C. COOPER,
Solicitor for Complainant.

(Endorsed:) In the United States circuit court, fifth circuit, in and for *northern* district of Florida. In chancery. National Bank of Jacksonville *vs.* T. B. Merrill. Filed Oct. 7th, 1895. E. O. Locke, clerk. Setting down of exceptions for argument. Cooper & Cooper.

31 In the United States Circuit Court, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver, etc.

The defendant and his solicitors will please take notice that on Monday, the 23d day of December, A. D. 1895, at 10 a. m., or as soon thereafter as counsel can be heard, I will call up before the said court for a hearing the exceptions to the defendant's answer in the above-stated cause.

J. C. COOPER,
Solicitor for Plaintiff.

Service accepted December 3d, 1895.
FLETCHER & WURTS,
Solicitors for Defendant.

(Endorsed:) In the United States circuit court, fifth circuit, in and for southern district of Florida. The National Bank of Jacksonville *vs.* T. B. Merrill, as receiver, etc. Filed this 4th day of December, A. D. 1895. E. O. Locke, clerk. Notice to hear exceptions. J. C. Cooper, attorney for plaintiff.

32 THURSDAY, *January 9th*, 1896.

Present: Hon. Jas. W. Locke, district judge.
Ordered that court be opened.
And court is opened by due proclamation.

NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, Receiver.

Ordered, that the exceptions to the answer herein be overruled, without prejudice to an amendment of the prayer of the bill asking that the receiver be instructed to certify to the comptroller the proof of the claim as desired.

* * * * * * *

In the United States Circuit Court, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka. } In Chancery.

Now comes the complainant, by its solicitor, and sets down this cause for final hearing upon the bill and answer filed herein, January 29th, 1896.

J. C. COOPER,
Solicitor for Complainant.

33 (Endorsed:) In United States circuit court, fifth circuit, in and for southern district of Florida. National Bank of Jacksonville *vs.* T. B. Merrill, as receiver. Filed this 29th day of January, A. D. 1896. N. A. Greening, deputy clerk. Notice setting down case on bill and answer. J. C. Cooper.

In the United States Circuit Court, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka. } In Chancery.

This cause having been set for final hearing upon the bill and answer herein, and having been argued by counsel, and the court having considered of its decree,

It is ordered, adjudged and decreed, that the complainant is entitled to receive from the assets of the said First National Bank of Palatka a distributive share and dividend as one of the creditors of said bank, based upon, and to be calculated upon the whole amount of the indebtedness due said complainant from said bank, principal and interest, to wit: upon the basis of the sum of sixteen thousand one hundred and three and eighty-one one-hundredths dollars ($16,103.81), as the amount of the indebtedness due complainant on July 17th, 1891, with interest thereon from July 17th, 1891,
34 and crediting thereon as partial payments the dividends heretofore paid on the dates of their several payments.

It is further ordered, adjudged and decreed, that the said defendant, as receiver, declare the dividend to be due to complainant upon the said basis of its said claim, as above stated, and that said amount of such dividend should be paid out of any assets of the defendant bank which were in the hands of the said defendant, as receiver, on the 15th day of March, 1894, or came into his hands since the said 15th day of March, 1894, after the payment out of such assets of any costs and expenses of such receivership as may have remained unpaid since the 15th day of March, 1894.

It is further ordered, adjudged and decreed, that the said defendant, as such receiver, do declare said dividend as payable to the said complainant, and do pay said complainant the amount of such

dividend out of any assets that were in the hands of said receiver on the 15th of March, 1894, or may have come into his hands since the 15th day of March, 1894, after deducting from said assets the costs and expenses of said receivership due on that date or accruing since.

It is further ordered, adjudged and decreed, that the said defendant, as receiver of said First National Bank of Palatka, do file within thirty days, in this cause in this court, an account showing the amount of assets in his hands on the 15th day of March, 1894, and received by him out of the assets of said bank since the 15th day of March, 1894, and the expenditures out of same for the expenses and management of such receivership, as hereinbefore mentioned,
35 and that the amount due to the complainant upon the dividends to it, as a creditor of said bank, upon the basis hereinbefore decreed, shall be paid to said complainant out of such balance of such assets as were in the hands of said receiver on the 15th day of March, 1894, aforesaid, and have been received by him since the 15th of March, 1894.

It is further ordered, that the costs in this cause be paid by the complainant and defendant, each to pay one-half of same.

Done and ordered in open court, this 29th day of January, A. D. 1896.

JAMES W. LOCKE, *Judge.*

(Endorsed:) In the United States circuit court, fifth circuit, in and for southern district of Florida. National Bank of Jacksonville *vs.* T. B. Merrill, as receiver, etc. Filed January 29, 1896. E. O. Locke, clerk. Order, decree.

36 In the Circuit Court of the United States, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B. MERRILL, Receiver, Defendant. } In Equity.

Assignment of Error on Appeal.

And now on this 14th day of March, A. D. 1896, comes the defendant, T. B. Merrill, receiver, by Fletcher & Wurts, his solicitors, and says that the decree in said cause is erroneous and against the just rights of said defendant for the following reasons:

First. Because the court erred in rendering the decree overruling the defendant's demurrer to the bill of complainant herein.

Second. Because the court erred in rendering the final decree herein. (*a*) Because the said decree herein requires the defendant to declare and pay dividends, whereas the law does not vest receivers of national banks with authority to either declare or pay dividends. (*b*) Because said final decree requires the defendant to file an account showing the assets in his hands, and his expenditures, which order is beyond the power of said court to enforce.

37 Wherefore the said defendant prays that the said decree be reversed, and that the said court may be directed to enter a decree dismissing said bill.

FLETCHER & WURTS,
Solicitors for Defendant.

(Endorsed:) In circuit court of the United States, southern district of Florida. In equity. National Bank of Jacksonville, complainant, *vs.* T. B. Merrill, receiver, defendant. Assignment of error. Filed March 16, 1896. N. A. Greening, D. C.

In the Circuit Court of the United States for the Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B. MERRILL, Receiver, Defendant. } In Equity.

The above-named defendant, conceiving himself aggrieved by the decree made and entered on the 29th day of January, 1896, in the above-entitled cause, does hereby appeal from said order and decree to the United States circuit court of appeals for the fifth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which
38 said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the fifth circuit.

FLETCHER & WURTS,
Attorneys for Defendant, Jacksonville, Fla.

March 3rd, 1896.

The foregoing claim of appeal is allowed, and the same being taken by order of the Comptroller of the Currency, it is ordered that said appeal shall operate as a supersedeas, without bond.

Done and ordered at chambers, at Key West, Florida, this 14th day of March, A. D. 1896.

JAMES W. LOCKE, *Judge.*

Endorsed: In circuit court of the United States for the southern district of Florida. In equity. The National Bank of Jacksonville, complainant, *vs.* T. B. Merril-, receiver, defendant. Claim of appeal and order. Filed March 16th, 1896. N. A. Greening, D. C.

39 In the United States Circuit Court of Appeals for the Fifth Circuit.

T. B. MERRILL, Receiver, Appellant,
vs.
THE NATIONAL BANK OF JACKSONVILLE, Respondent. } In Equity.

THE UNITED STATES OF AMERICA, *Fifth Judicial Circuit,* } *ss:*

To the National Bank of Jacksonville, a corporation organized and existing under the laws of the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit — of appeals for the fifth circuit, to be holden at the city of New Orleans in said circuit, on the 13th day of April next, pursuant to an appeal allowed herein and filed in the clerk's office of the circuit court of the United States for the southern district of Florida, wherein T. B. Merrill, receiver, is appellant, and you are respondent, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of March, in the year of our
40 Lord one thousand eight hundred and ninety-six.

JAMES W. LOCKE,
U. S. Judge.

(Endorsed:) In the United States circuit court of appeals for the fifth circuit, State of Florida. In equity. T. B. Merrill, receiver, appellant, *vs.* The National Bank of Jacksonville, respondent.

Received this citation at Jacksonville, Fla., on March 17, 1896, and executed it by serving a true copy on W. B. Barnett, president of the National Bank of Jacksonville, at Jacksonville, Fla., on March 18, 1896, and at the same time exhibiting to him the original.

JAMES McKAY,
U. S. Marshal.

March 18, 1896.

United States Circuit Court, Fifth Circuit, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka, Defendant.

I, Eugene O. Locke, clerk of the United States circuit court,
41 fifth judicial circuit, southern district of Florida, do hereby certify that the foregoing pages, numbered from one to thirty-

five, both inclusive, *is* a true and correct transcript of the record, assignment of errors, and all proceedings in the above-entitled cause, from the files and records of my office.

Witness my hand and seal of said court, at the city of [SEAL.] Jacksonville, in the district and circuit aforesaid, this 24th day of March, A. D. 1896, and of our Independence the 120th.

EUGENE O. LOCKE, *Clerk.*

42 & 43 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the southern district of Florida, Greeting.

Whereas, lately in the circuit court of the United States for the southern district of Florida before you, or some of you, in a cause between The National Bank of Jacksonville, complainant, and T. B. Merrill, as receiver of the First National Bank of Palatka, defendant, wherein a decree was rendered by said circuit court in the words and figures following to wit:

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka. } In Chancery.

This cause having been set for final hearing upon the bill and answer herein, and having been argued by counsel, and the court having considered of its decree,

It is ordered, adjudged and decreed, that the complainant is entitled to receive from the assets of the said First National Bank of Palatka a distributive share and dividend as one of the creditors of said bank, based upon, and to be calculated upon the whole amount of the indebtedness due said complainant from said bank, principal and interest, to wit: Upon the basis of the sum of sixteen thou-
44 sand, one hundred and three and eighty-one one-hundreths dollars ($16,103.80), as the amount of the indebtedness due complainant on July 17th, 1891, with interest thereon from July 17th, 1891, and crediting thereon as partial payments the dividends heretofore paid on the dates of their several payments.

It is further ordered, adjudged and decreed, that the said defendant, as receiver, declare the dividend to be due to complainant upon the said basis of its said claim, as above stated, and that said amount of such dividend should be paid out of any assets of the defendant bank which were in the hands of the said defendant, as receiver, on the 15th day of March, 1894, or came into his hands since the said 15th day of March, 1894, after the payment out of such assets of any costs and expenses of such receivership as may have remained unpaid since the 15th day of March, 1894.

It is further ordered, adjudged and decreed, that the said defendant, as such receiver, do declare said dividend as payable to the said complainant, and do pay said complainant the amount of such dividend out of any assets that were in the hands of said receiver on the 15th day of March, 1894, or may have come into his hands since the 15th day of March, 1894, after deducting from said assets the costs and expenses of said receivership due on that date or accruing since.

It is further ordered, adjudged and decreed, that the said defendant, as receiver of said First National Bank of Palatka, do file within thirty days, in this cause in this court, an account showing the amounts of assets in his hands on the 15th day of March, 1894, and received by him out of the assets of said bank since the 15th day of March, 1894, and the expenditures out same for the expenses and management of such receivership, as hereinbefore mentioned,
45 and that the amount due to the complainant upon the dividends to it, as a creditor of said bank, upon the basis hereinbefore decreed, shall be paid to said complainant out of such balance of such assets as were in the hands of said receiver on the 15th day of March, 1894, aforesaid, and have been received by him since the 15th day of March, 1894.

It is further ordered, that the costs in this cause be paid by the complainant and defendant, each to pay one-half of same.

Done and ordered in open court, this 29th day of January, A. D. 1896.

JAMES W. LOCKE, *Judge.*

As by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the fifth circuit by virtue of an appeal sued out by said T. B. Merrill, receiver, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of November, in the year of our Lord one thousand eight hundred and ninety-five, the said cause came on to be heard before the said United States circuit court of appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be and the same is hereby reversed, and this cause remanded to said circuit court, with instructions to enter a decree in accordance with the views expressed in the opinion rendered by this court in this cause, the costs of appeal to be paid by the National
46 Bank of Jacksonville, and the costs of the circuit court to be paid by the receiver, as part of the expenses of his administration.

JUNE 15, 1896.

You, therefore, are hereby commanded that such further proceedings be had in said cause in accordance with the decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 30th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Filed July 6, 1896.

E. O. LOCKE, *Clerk.*

In the Circuit Court of the United States, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka.

This cause coming on to be heard upon the application of the complainant's solicitor for a decree to carry out and enforce
47 the mandate of the United States circuit court of appeals for the fifth circuit, in the said cause, and in pursuance of the said mandate on file in this court, it is ordered, adjudged and decreed, that on the first day of July, A. D. 1891, the said First National Bank of Palatka was indebted to The National Bank of Jacksonville, the complainant herein, upon a certain certificate of deposit mentioned and described in the bill of complaint, amounting at that date to the sum of ten thousand and ninety-three and $\frac{34}{100}$ dollars ($10,093.34), according to the face thereof, and that said indebtedness was duly presented by the National Bank of Jacksonville to the said T. B. Merrill as receiver of the First National Bank of Palatka, and proven before him as an existing indebtedness in favor of the complainant against the said First National Bank of Palatka, and dividends should have been allowed and paid out of the assets of the First National Bank of Palatka on the said amount as of the date of July 1st, 1891, without regard to any collaterals held by the said complainant, The National Bank of Jacksonville, to secure same, or any deduction from said sum of said indebtedness of any amounts collected by said complainant upon said collaterals after the insolvency of the First National Bank of Palatka.

It is further ordered, adjudged and decreed that the said complainant, The National Bank of Jacksonville, is entitled to and should be paid dividends out of the assets of said First National Bank of Palatka upon the said indebtedness presented to said receiver and proven as above decreed in the same manner and to the same extent proportionally as has been allowed and paid on the other indebtedness of the said First National Bank of Palatka, with eight per cent. dividends from the date of the declaration thereof,
48 less a credit of the sums heretofore paid as dividends on the portion of said indebtedness heretofore allowed, such sum on which dividend has been heretofore allowed being $4,496.44, the balance of said indebtedness, after deducting collections from collaterals, provided however, that the dividends heretofore paid and hereafter to be paid on said sum of $10,093.34, together with the

amounts received by complainant on the collaterals securing said indebtedness, will not exceed one hundred cents on the dollar on the principal and interest of said indebtedness.

It is further ordered, adjudged and decreed that T. B. Merrill, as receiver of the First National Bank of Palatka, the defendant herein, do recognize the said National Bank of Jacksonville as a creditor of the First National Bank of Palatka in the said sum of ten thousand and ninety-three and $\frac{34}{100}$ dollars ($10,093.34) as of the date of July 17th, 1891, that being the date of insolvency of the said First National Bank of Palatka, and that he should pay the said dividends to the complainant upon said indebtedness, as hereinbefore decreed, and in the manner and to the extent as hereinbefore decreed, or that he do certify the same to the Comptroller of the Currency of the United States, to be paid as aforesaid in due course of administration of the assets of the said First National Bank of Palatka.

It is further ordered, adjudged and decreed that the said complainant, The National Bank of Jacksonville, is entitled to receive and that it do receive out of the assets of the First National Bank of Palatka, before further payments are made of such assets to the other creditors of said First National Bank of Palatka the said due proportion of dividends due to the complainant as hereinbefore decreed with interest thereon, said dividends so to be paid to said complainant to be in due proportion as hereinbefore decreed with those already paid to the other creditors of said First National Bank of Palatka to the extent hereinbefore decreed.

49 It is further ordered, adjudged and decreed, that the cost of this court in the said cause be paid by the defendant, T. B. Merrill, as receiver of the First National Bank of Palatka, as part of the expenses of the administration of said assets and the costs of said appeal to be paid by said National Bank of Jacksonville, taxed at $128.25.

Done and ordered in open court at Jacksonville, Florida, this 27th day of July, A. D. 1896.

JAMES W. LOCKE, *Judge.*

(Endorsed on cover: U. S. circuit court, so. dist. Fla. Nat. Bank of Fla. *vs.* T. B. Merrill, rec. Filed this 27th day of July, A. D. 1896. E. O. Locke, clerk. Final decree on the mandate. Cooper, J. C.)

In the United States Circuit Court, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B. MERRILL, Receiver of the First National Bank of Palatka, Defendant.

Assignment of Errors on Appeal.

And now, on this 26th day of September, A. D. 1896, comes the defendant, T. B. Merrill, receiver of the First National Bank of

Palatka, by D. U. Fletcher, his solicitor, and says that the decree in the above cause is erroneous and against the just rights of said defendant for the following reasons:

50 First. Because said decree declares that said First National Bank of Palatka was indebted to complainant July 1st, 1891, in the sum of $10,093.34, and that said indebtedness was duly presented and proven before the defendant, as mentioned, and that dividends should have been allowed and paid out of the assets of said bank on the said amount as of the date of July 1st, 1891, without regard to any collateral held by complainant to secure the same or any deduction from said sum of said indebtedness of any amounts collected by complainant upon said collateral after the insolvency of the said First National Bank of Palatka.

Second. Because the complainant is decreed to be entitled to be paid dividends out of the assets of the said First National Bank of Palatka upon its entire claim in the same manner and to the same extent as has been allowed and paid on the other indebtedness of the Palatka bank, with eight per cent. interest, on such dividends, less what has been paid, provided the dividends heretofore paid and hereafter to be paid on the sum of $10,093.34, together with amounts received on collateral held by complainant will not exceed one hundred cents on the dollar of principal and interest on said indebtedness.

Third. Because it orders that defendant recognize complainant as a creditor of the First National Bank of Palatka in the sum of $10,093.34, as of the date of July 17th, 1891, and that he should pay dividends to complainant upon said indebtedness (the same as to all creditors who held no collateral), or that he certify to the Comptroller of the Currency, to be paid as aforesaid.

Fourth. Because it orders that complainant do receive out of the assets of said First National Bank of Palatka, before further payments are made of such assets to other creditors, dividends, in due proportion with those already paid to the other creditors of

51 said Palatka bank, on complainant's entire claim of $10,093.34, without regard to its collateral or the amounts received therefrom, with interest on such dividends, as mentioned in said decree.

Fifth. Because said decree is not in accordance with the mandate of the circuit court of appeals herein.

Wherefore the said defendant prays that the said decree may be reversed and that the said court may be directed to enter a decree dismissing the said bill.

DUNCAN U. FLETCHER,
Solicitor for Defendant.

(Endorsed on back: Circuit court of the U. S., so. dist. Fla. In equity. Nat. Bank of Jac. *vs.* T. B. Merrill, rec. First Nat. Bank of Palatka. Assignment of errors on appeal. Filed 30th Sept., 1896. E. O. Locke, clerk, by J. Otto, dep'y clerk. Duncan U. Fletcher, att'y for def't.)

In the Circuit Court of the United States, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B. MERRILL, Receiver, Defendant. } In Equity.

The above-named defendant conceiving himself aggrieved by the decree made and entered on the 27th day of July, A. D. 1896, in the above-entitled cause, does hereby appeal from said order and decree to the United States circuit court of appeals for the fifth cir-
52 cuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order and decree was made, including the entire record in said cause from the commencement of said suit, duly authenticated, may be sent to the United States circuit court of appeals for the fifth circuit.

DUNCAN U. FLETCHER,
Solicitor for said Defendant, T. B. Merrill, Receiver.

September 26th, 1896.

The foregoing claim of appeal is allowed and the same being taken by order of the Comptroller of the Currency, it is ordered that said appeal shall operate as a supersedeas without bond.

Done and ordered at chambers this 26th day of September, 1896.

JAMES W. LOCKE, *Judge.*

(Endorsed on back: National Bank of Jacksonville *vs.* T. B. Merrill, receiver. Order granting appeal. Filed Sept. 30th, 1896. E. O. Locke, clerk, by J. Otto, dep'y clerk.)

53 In the United States Circuit Court of Appeals for the Fifth Circuit.

T. B. MERRILL, Receiver, Appellant,
vs.
THE NATIONAL BANK OF JACKSONVILLE, Respondent.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

To the National Bank of Jacksonville, a corporation organized and existing under the laws of the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States court of appeals for the fifth circuit, to be holden at the city of New Orleans in said circuit, on the fifth day of November next, pursuant to an appeal allowed herein and filed in the clerk's office of the circuit court of the United States for the southern district of Florida, wherein T. B. Merrill, receiver, is ap-

pellant, and you are respondent, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES W. LOCKE, *U. S. Judge.*

54 Received this citation at Jacksonville, Fla., and executed it by delivering a true copy to W. B. Barnett, president of the National Bank of Jacksonville, at Jacksonville, Fla., on October 9th, 1896, and at the same time exhibiting to them the original.

JAMES McKAY,
U. S. Marshal.

October 9th, 1896.

United States Circuit Court, Fifth Circuit, Southern District of Florida.

THE NATIONAL BANK OF JACKSONVILLE, Complainant,
vs.
T. B. MERRILL, as Receiver of the First National Bank of Palatka, Defendant.

I, Eugene O. Locke, clerk of the United States circuit court, fifth judicial circuit, southern district of Florida, do hereby certify that the foregoing pages, numbered from one to 54, both inclusive, *is* a true and correct transcript of the record, assignment of errors, and all proceedings in the above-entitled cause, from the files and records of my office.

Witness my hand and seal of this court, at the city of [SEAL.] Jacksonville, in the district and circuit aforesaid, this 13th day of October, A. D. 1896, and of our Independence the one hundred and twentieth.

EUGENE O. LOCKE, *Clerk.*

(Endorsed:) Filed Oct. 23, 1896. J. M. McKee, clerk.

55 PROCEEDINGS BEFORE THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

Motion by Appellee to Dismiss Appeal.

In the United States Circuit Court of Appeals, Fifth Circuit.

T. B. MERRILL, Receiver, Appellant,
vs.
THE NATIONAL BANK OF JACKSONVILLE, Respondent.

Now comes the appellee, The National Bank of Jacksonville, by John C. Cooper, its solicitor, and moves the court to dismiss the appeal in the above-entitled cause on the following grounds, to wit:

1st. No appeal lies from a decree entered in accordance with the mandate of the United States circuit court of appeals.

2nd. The United States circuit court of appeals will not review on appeal the action of the court below in entering a decree upon the mandate of this court.

3rd. No errors are assigned in this cause, as required by the rules of practice, which this court would review on appeal.

All of which is respectfully submitted.

J. C. COOPER,
Solicitor for Appellee.

You will please take notice that on November 16th, 1896, or as soon thereafter as counsel can be heard, we will move the said court to dismiss the appeal in the above-entitled cause on the grounds in the motion above set forth, copy of which is herewith served upon you.

J. C. COOPER,
Solicitor for Appellee.

Copy of the foregoing notice and of the motion therein referred to received and service accepted this 23rd day of November, A. D. 1896.

D. U. FLETCHER,
56 *Solicitor for Appellant.*

(Endorsed:) Filed November 16, 1896. J. M. McKee, clerk.

Motion by Appellant to Advance Cause.

In the United States Circuit Court of Appeals, Fifth Circuit.

T. B. MERRILL, Receiver, Appellant,
vs.
NATIONAL BANK OF JACKSONVILLE, Appellee.

Now comes the appellant herein and moves the court to advance said cause and for leave to submit the same on its merits on, to wit, November 30th, 1896, at the same time the motion to dismiss made herein is heard, because this appeal is prosecuted by order of the Comptroller of the Currency, the action having been brought against an officer of the United States and it being desirable and important that the questions involved herein be passed upon by this court, and if the decree appealed from be affirmed, by the Supreme Court as speedily as may be.

D. U. FLETCHER,
Solicitor for Appellant.

To John C. Cooper, Esq., solicitor for appellee:

You will please *take notice* that on November 30th, 1896, at the opening of court, or as soon thereafter as counsel can be heard, we will present the foregoing motion to the court and ask for action

thereon, and we will submit at the said time the said cause on its merits, if leave is granted.

D. U. FLETCHER,
Solicitor for Appellant.

Copy of the foregoing notice received and copy of said motion received this 23rd day of November, A. D. 1896, subject to objection. The rules as to submitting case on merits have not been complied with and case has not been set for argument.

57 J. C. COOPER,
Solicitor for Appellee.

(Endorsed): Filed November 25, 1896. J. M. McKee, clerk.

Agreement to Postpone Motion to Dismiss Appeal.

In the United States Circuit Court of Appeals, Fifth Circuit.

T. B. MERRILL, as Receiver, Appellant,
vs.
THE NATIONAL BANK OF JACKSONVILLE, Appellee.

It is stipulated and agreed by and between D. U. Fletcher, Esq., solicitor for appellant, T. B. Merrill, as receiver, etc., and John C. Cooper, Esq., solicitor for appellee, The National Bank of Jacksonville, that the hearing of the motion of the appellee to dismiss the appeal in said above-entitled cause, with the permission of the court, be postponed until Monday, the 30th day of November, A. D. 1896.

D. U. FLETCHER,
Solicitor for Appellant.
J. C. COOPER,
Solicitor for Appellee.

(Endorsed): Filed November 26th, 1896. J. M. McKee, clerk.

58 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1896.

(*Extract from Minutes.*)

MONDAY, *November* 30, 1896.

T. B. MERRILL, Receiver,
vs.
THE NATIONAL BANK OF JACKSONVILLE.

This day was submitted to the court the motion of appellee to dismiss the appeal herein, and also the motion of the appellant to advance this cause on the docket for hearing on merits.

November Term, 1896.

(*Extract from Minutes.*)

TUESDAY, *December* 8, 1896.

T. B. MERRILL, Receiver,
vs.
THE NATIONAL BANK OF JACKSONVILLE.

This cause came on to be heard on the motion of the appellee to dismiss the appeal sued out from the circuit court of the United States for the southern district of Florida and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the appeal sued out in this cause be, and the same is hereby, dismissed at the cost of the appellant.

59 *Petition and Order Granting Appeal.*

In the Circuit Court of Appeals for the Fifth Circuit.

THE NATIONAL BANK OF JACKSONVILLE, Appellee,
against
T. B. MERRILL, as Receiver.

The above-named respondent and appellant, T. B. Merrill, feeling himself aggrieved by the decree of this court of the 8th December, 1896, dismissing the appellant's appeal from the final decree in this action of the circuit court of the United States for the district of Florida, does hereby appeal to the Supreme Court of the United States from the said decree, and prays that his appeal may be allowed and a citation granted, directed to the appellee, commanding it to appear before the Supreme Court of the United States on the thirtieth day after the allowance of this appeal, and do and receive what may appertain *of* justice to be done in the premises, and that a transcript of the papers used upon said appeal to the circuit court of appeals, which resulted in said decree dismissing the appeal in said cause, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated twenty-fourth December, 1896.

DUNCAN U. FLETCHER,
Solicitor for said Def't, App'l't.

The foregoing appeal is hereby allowed.
Dated eleventh day of January, 1897.

E. D. WHITE,
Associate Justice.

(Endorsed:) Filed Jan'y 16, 1897. J. M. McKee, clerk.

60 *Opinion.*

Filed December 8th, 1896.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1896.

T. B. MERRILL, Receiver, Appellant,
vs.
THE NATIONAL BANK OF JACKSONVILLE, Appellee.

Appeal from the United States circuit court, southern district of Florida.

Before Pardee and McCormick, circuit judges, and Maxey, district judge.

PARDEE, circuit judge, delivered the opinion of the court:

This case was before this court at the last term and was then heard and determined upon its merits. In the decree then rendered we reversed the former decree of the circuit court and remanded the cause with instructions to enter a decree in accordance with the views expressed in the opinion of the court; in which opinion the decree to entered was specifically outlined and determined. On entering the mandate in the circuit court a decree in exact accordance with our mandate was entered; whereupon T. B. Merrill, receiver, sued out the present appeal.

The appellee has moved to dismiss the appeal on the ground that no appeal lies from a decree entered in the circuit court in accordance with the mandate of this court, and this motion should be granted.

In Stewart *v.* Salomon, 97 U. S., 361, it was expressly decided that an appeal from the decree which the circuit court passed in accordance with the mandate of the Supreme Court upon a previous appeal will, upon the motion of the appellee, be dismissed with costs.

In Humphrey *v.* Baker, 103 U. S., 736, the precise question was again decided and in the same way. Stewart *v.* Salomon,
61 *supra*, has been continuously approved. Mackall *v.* Richards, 116 U. S., 45; Gaines *v.* Rugg, 148 U. S., 228, 242; Texas & Pacific R'y Company *v.* Anderson, 149 U. S., 237, 242; Aspen Mining, &c., Co. *v.* Billings, 150 U. S., 31, 37; *In re* Sanford Fork & Tool Co., 160 U. S., 247, 259.

In opposition to the motion to dismiss, it is urged that under the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes, approved March 3, 1891," an appeal lies to the Supreme Court of the United States from the decision of this court, and therefore the present appeal should be heard.

If we concede that such appeal lies, we see in it no reason to vary from the uniform practice established by the Supreme Court in regard to second appeals in the same case.

The appeal is dismissed.

62 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing sixty-two pages, numbered from *a* to 61, inclusive, contain a true copy of the record, pleas, process, and proceedings in the case of T. B. Merrill, receiver, appellant, *v.* The National Bank of Jacksonville, appellee, No. 542, as the same remains upon the files and record of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 28 day of January, A. D. 1897.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

63 UNITED STATES OF AMERICA, *ss:*

To the National Bank of Jacksonville, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein T. B. Merrill is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this eleventh day of January, in the year of our Lord one thousand eight hundred and ninety-seven.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

64 On this 14th day of January, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared Frank Drew before me, the subscriber, a notary public in and for the State of Florida at large, duly commissioned and authorized, and makes oath that he delivered a true copy of the within citation to William B. Barnett, as and who is the president of the said National Bank of Jacksonville, at Jacksonville, in county of Duval and State of Florida.

FRANK DREW.

Sworn to and subscribed the 14th day of January, A. D. 1897.

[Seal of John W. Dodge, Notary Public, State of Florida.]

JNO. W. DODGE,
Notary Public, State of Fla. at Large.

Endorsed on cover: Case No. 16,487. U. S. C. C. of appeals, 5th circuit. Term No., 301. T. B. Merrill, as receiver of the First National Bank of Palatka, appellant, *vs.* The National Bank of Jacksonville. Filed February 6, 1897.

Nos. 54 & 55.

Brief of Paige for Appt.

Supreme Court of the United States

Numbers 54 and 55 of October Term, 1898.
300 and 301 of October Term, 1897.

Filed Oct. 17, 1898.

T. B. MERRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF PALATKA,
Appellant,

v.

THE NATIONAL BANK OF JACKSONVILLE.

A BRIEF FOR APPELLANT.

Supreme Court of the United States.

NUMBERS 54 AND 55 OF OCTOBER TERM, 1898.
300 AND 301 OF OCTOBER TERM, 1897.

T. B. MERRILL, as receiver of the FIRST NATIONAL BANK OF PALATKA,

Appellant,

vs.

THE NATIONAL BANK OF JACKSONVILLE.

A BRIEF FOR APPELLANT.

These are two appeals, in the same case, from two decrees of the Circuit Court of Appeals for the Fifth Circuit.

Abstract or Statement of the Case.

The National Bank of Jacksonville exhibited its bill against Merrill, receiver of the First National Bank of Palatka, to the Circuit Court for the District of Florida.

The case was heard on bill and answer. Allegations in the bill, not denied by the answer, and allegations of other matter in the answer are as follows:

From the Bill.

"That on the 17th day of July, A. D. 1891, the said "First National Bank of Palatka failed, and closed its "doors."

"That at the time of the failure of the First National "Bank of Palatka it was indebted to your orator for sun- "dry drafts of said bank to the order of your orator on "the Hanover National Bank of New York, amounting, "with fees, to $6,010.47 (six thousand and ten and 47/100 "dollars), which said indebtedness was unsecured by col- "lateral.

"And said First National Bank of Palatka was further "indebted to your orator at the time of its failure in the "sum of ten thousand dollars ($10,000.00), and interest, "for a loan made said bank by your orator on June 5th, "A. D. 1891; that at the time said loan was made the said "First National Bank of Palatka delivered to your orator "their time certificate of deposit, No. 6120, due in sixty "days from date, bearing interest at eight per cent., to "which said bank attached, as collateral security, sundry "notes belonging to said First National Bank of Palatka, "to wit:

"St. James on Gulf	$1,000 00
"R. H. Mason	250 00
"T. V. Hinks	300 00
"G. U. Beach	300 00
"G. U. Beach	2,000 00
"The Florida Commercial Co	396 90
"A. B. Mason	1,300 00
"A. L. Hart	5,350 22
Total	$10,896 22

"The total indebtedness due to your orator from the "First National Bank of Palatka on the day of its failure "was:

"For sundry drafts	$6,010.47
"For certificate of deposit, loan and "interest	10,093.34
"Total amount due	$16,103.81

" Making a total of sixteen thousand, one hundred and " three and 81/100 dollars ($16,103.81) due to your orator " from the First National Bank of Palatka on the 17th " day of July, A. D. 1891.

" That your orator proved its claim, in due form of " law, before said Receiver aforesaid, for six thousand " and ten and 47/100 dollars, being amount of drafts due " to your orator from said First National Bank of Palatka, " and upon which said amount so proven your orator has " received distributions as follows:

" December 10th, 1892.....	35%	$2,103.67.
" May 17th, 1893.....	10%	601.05
" Total..		$2,704.72

" That in addition to proving the amount of $6,010.47 " due on sundry drafts aforesaid, your orator offered to " prove up its claim for $10,000.00, being amount of cer- " tificate of deposit secured by collateral, as aforesaid, but " the said defendant Receiver would not permit your orator " to prove the total amount of $10,000.00 and interest due " thereon for said loan as aforesaid, but under the ruling " of the Comptroller of the United States of America, " your orator was not allowed to prove its claim in full " before the defendant Receiver, but was ordered to first " exhaust the collateral given to secure said loan for $10,- " 000.00, as aforesaid, and then to prove the claim for the " difference between the amount of the loan and interest, " and the amount realized from said collateral.

" Under the ruling of the Comptroller your orator col- " lected all of the notes given as collateral to secure said " loan of $10,000.00, except the note of H. L. Hart for " five thousand three hundred and fifty and 22/100 dollars, " which last mentioned note was placed in judgment, and " which judgment was non-productive, and which said

"judgment has been assigned and transferred by your "orator to the defendant herein as Receiver, as aforesaid.

"That after exhausting the collateral your orator proved "its claim for the balance due on said certificate of deposit "for $10,000.00, so secured by said collateral, as afore- "said, to wit: for the sum of four thousand four hundred "and ninety-six and 44/100 dollars, upon which said "balance of $4,496.44 your orator has received the fol- "lowing dividends from the defendant Receiver, to wit:

"December 1st, 1892.....	$1,573.75
"May 17th, 1893.....	449.64
"Total.....	$2,033.39."

(R. in 54, pp. 2–3.)

"That your orator is informed and believes, and upon "such information and belief, so charges the truth to be "that the same rule was applied as to other creditors of "the said First National Bank of Palatka."

"That your orator does not know, without a discovery, "what amount of assets the defendant, as such Receiver, "did receive, and what disposition he made of them, or "what amount your orator is justly entitled to receive "under the distribution by the Receiver herein, and that "an accounting is necessary to ascertain the same."

(R. in 54, p. 3.)

The prayer was as follows:

"That the defendant may discover the amount of assets "of said First National Bank of Palatka that came into "his hands, and account for the same, and that the de- "fendant may be decreed to pay to your orator (and to all "other creditors of said First National Bank of Palatka "in like situation, who may come in and make them- "selves parties to this suit, and contribute to the expenses

"thereof), a *pro rata* distribution upon the entire amount "of indebtedness due to your orator from the said First "National Bank of Palatka, to wit.: upon the sum of six- "teen thousand one hundred and three and 81/100 dol- "lars, together with interest thereon from the 17th "day of July, A. D. 1891, without deducting there- "from the amount realized from collateral given to secure "a portion of said amount due your orator from said bank "as aforesaid.

"That the defendant may wind up the affairs of said "bank and of his said receivership thereof, without fur- "ther delay."

(R. in 54, p. 4.)

From the Answer.

"And further answering the said bill this defendant "denies that the complainant gave due notice that it would "demand a *pro rata* dividend upon the whole amount due "to it without deducting the amount collected on collateral "security; on the contrary thereof this defendant avers "the fact to be that the complainant accepted the said "ruling of the said Comptroller without demur and "accepted from the said Comptroller, through this defend- "ant, without protesting notice of any kind, the checks "of the said Comptroller in payment of the dividends "mentioned in the bill, and that it was not until the 15th "of March, 1894, that the complainant gave notice of any "kind that it dissented from the said ruling of the Comp- "troller, and would demand payment upon a different "basis; that since December 1st, 1892, the said Comp- "troller has made disposition of the assets of the said bank "in his hands in good faith, believing that the matter of "his said ruling was at rest; so that the complainant "should now be estopped to demand an apportionment on "a different basis.

"And further answering the said bill this defendant says "that he has realized in money from the assets of the said "bank the sum of $176,317.91; that under the orders of "the said Comptroller he has disbursed the sum ot $31,- "561.33 for the expenses of his receivership, 'in which "expenses are included moneys paid on decree in litigated "case in this Court, and for loans paid, etc., amounting "to the sum of $17,653.55'; that he has transmitted to "the said Comptroller, as required by law, the sum of "$143,849.03; that there remains in the hands of this de- "fendant the sum of $907.55, which is subject exclusively "to the orders of the said Comptroller, and that the re- "maining assets of the said bank consist of sundry par- "cels of real property and some securities and choses in "action, many of which are absolutely worthless, and the "value of the rest of which cannot be estimated."

(R. in 54, pp. 9–10.)

Upon this the circuit court made a decree.—That

1. The complainant was entitled to receive dividends upon the whole face of the indebtedness due 17th July, 1891, with interest, less the dividends actually paid to it.

3. That the receiver, Merrill, declare the dividend and pay it out of any assets which were in his hands 15th March, 1894.

This suit was begun 11th September, 1894. (R. in 54, p. 5.)

3. That he file an account. (R. in 54, p. 17.)

From this decree Merrill appealed to the court of appeals.

That court made a decree reversing the decree of the circuit court, and remanding the cause to that court with directions to enter a decree that the receiver "do recog-

nize" the complainant "as a creditor" "in the said sum "of $10,093.34, as of date July 17th, 1891; and that he "do pay the same or certify the same to the Comptroller "of the Currency, to be paid in due course of administra- "tion," (R. in 54, p. 29.)

From that decree Merrill now appeals.

And this is number 300 of 1897, and 54 of 1898.

We suppose this decree to be not appealable, because it is not final.

The mandate coming down, the circuit court entered a decree in accordance with the opinion of the court of appeals.

From that decree Merrill appealed to the court of appeals.

That court dismissed his appeal, and from the decree dismissing the appeal Merrill now appeals. (R. in 55, p. 30).

This is number 55 of 1898, and 301 of 1897.

Acts of Congress supposed to bear on the question of jurisdiction.

Chapter 290, Laws 1882. 22 Stat., 163.

"CHAP. 290.—An act to enable national banking associa- "tions to extend their corporate existence, and for "other purposes."

"SEC. 4.—That any association so extending the period "of its succession shall continue to enjoy all the rights "and privileges and immunities granted and shall con- "tinue to be subject to all the duties, liabilities, and re- "strictions imposed by the Revised Statutes of the United "States and other acts having reference to national bank- "ing associations, and it shall continue to be in all re- "spects the identical association it was before the

"extension of its period of succession: *Provided, how-*
"*ever*, That the jurisdiction for suits hereafter brought
"by or against any association established under any law
"providing for national-banking associations, *except suits*
"*between them and the United States, or its officers and*
"*agents*, shall be the same as, and, not other than, the
"jurisdiction for suits by or against banks not organized
"under any law of the United States which do or might
"do banking business where such national-banking asso-
"ciations may be doing business when such suits may be
"begun: And all laws and parts of laws of the United
"States inconsistent with this proviso be, and the same
"are hereby, repealed."

Italics mine.

Chapter 866 of 1888, 25 Stat., 434.

"That the circuit courts of the United States shall have
"original cognizance, concurrent with the courts of the
"several States, of all suits of a civil nature, at common
"law or in equity, where the matter in dispute exceeds,
"exclusive of interest and costs, the sum or value of two
"thousand dollars, and arising under the Constitution or
"laws of the United States," * * *

(p. 436.)

"SEC. 4. That all national-banking associations estab-
"lished under the laws of the United States shall,
"for the purposes of all actions by or against them,
"real, personal, or mixed, and all suits in equity, be
"deemed citizens of the States in which they are respec-
"tively located; and in such cases the circuit and district
"courts shall not have jurisdiction other than such as they
"have in cases between individual citizens of the same
"State.

"*The provisions of this section shall not be held to*
"*affect the jurisdiction of the United States courts in*

" *cases commenced* by the United States or *by direction* " *of any officer* thereof, or *cases for winding up the* " *affairs of any such bank*."

Italics mine.

Chapter 517 of 1891, 26 Stat., 827:

" SEC. 5. That appeals or writs of error may be taken " from the district courts or from the existing circuit " courts direct to the Supreme Court in the following cases:

" In any case in which the jurisdiction of the court is " in issue; in such cases the question of jurisdiction alone " shall be certified to the Supreme Court from the court " below for decision.

" From the final sentences and decrees in prize causes.

" In cases of conviction of a capital or otherwise in- " famous crime.

(828.) " In any case that involves the construction or " application of the Constitution of the United States.

" In any case in which the constitutionality of any law " of the United States or the validity or construction of " any treaty made under its authority, is drawn in ques- " tion.

" In any case in which the constitution or law of a State " is claimed to be in contravention of the Constitution of " the United States.

" Nothing in this act shall affect the jurisdiction of the " Supreme Court in cases appealed from the highest court " of a State, nor the construction of the statute providing " for review of such cases."

" SEC. 6. *That the circuit court of appeals* established " by this act *shall exercise appellate jurisdiction to review* " *by appeal*, or by writ of error *final decision in* the " district court and *the existing circuit courts in all cases* " *other than those provided for in the preceding section* " *of this act*, unless otherwise provided by law, and the " judgments or decrees of the circuit courts of appeals

" shall be final in all cases in which the jurisdiction is de-
" pendent entirely upon the opposite parties to the suit
" or controversy, being aliens and citizens of the United
" States or citizens of different States; also in all cases
" arising under the patent laws, under the revenue laws,
" and under the criminal laws and in admiralty cases, ex-
" cepting that in every such subject within its appellate
" jurisdiction the circuit court of appeals at any time may
" certify to the Supreme Court of the United States any
" questions or propositions of law concerning which it
" desires the instruction of that court for its proper de-
" cision. And thereupon the Supreme Court may either give
" its instruction on the questions and propositions certi-
" fied to it, which shall be binding upon the circuit court
" of appeals in such case, or it may require that the whole
" record and cause may be sent up to it for its considera-
" tion, and thereupon shall decide the whole matter in
" controversy in the same manner as if it had been brought
" there for review by writ of error or appeal.

" And excepting also that in any such case as is herein-
" before made final in the circuit court of appeals it shall
" be competent for the Supreme Court to require, by
" certiorari or otherwise, any such case to be certified
" to the Supreme Court for its review and determination
" with the same power and authority in the case as if it
" had been carried by appeal or writ of error to the
" Supreme Court.

" *In all cases not hereinbefore, in this section, made*
" *final there shall be of right an appeal or writ of error*
" *or review of the case by the Supreme Court of the*
" *United States* where the matter in controversy shall
" exceed one thousand dollars besides costs. But no
" such appeal shall be taken or writ of error sued out
" unless within one year after the entry of the order,
" judgment, or decree sought to be reviewed."

Italics mine.

Acts of Congress supposed to affect the merits.

Revised Statutes.

"SEC. 5234. On becoming satisfied, as specified in "sections fifty-two hundred and twenty-six and fifty-two "hundred and twenty-seven, that any association has re- "fused to pay its circulating notes as therein mentioned, "and is in default, the Comptroller of Currency may "forthwith appoint a receiver, and require of him such "bond and security as he deems proper. Such receiver, "under the direction of the Comptroller, shall take pos- "session of the books, records, and assets of every descrip- "tion of such association, collect all debts, dues, and "claims belonging to it, and, upon the order of a court of "record of competent jurisdiction, may sell or compound "all bad or doubtful debts, and, on a like order, may sell "all the real and personal property of such association, "on such terms as the court shall direct; and may, if "necessary to pay the debts of such association, enforce "the individual liability of the stockholders. Such re- "ceiver shall pay over all money so made to the Treasurer "of the United States, subject to the order of the Comp- "troller, and also make report to the Comptroller of all "his acts and proceedings."

Chapter 156, Laws 1876, 19 Stat., 63.

"That whenever any national banking association shall "be dissolved, and its rights, privileges and franchises "declared forfeited, as prescribed in section fifty-two "hundred and thirty-nine of the Revised Statutes of the "United States, or whenever any creditor of any national "banking association shall have obtained a judgment "against it in any court of record, and made application, "accompanied by a certificate from the clerk of the court, "stating that such judgment has been rendered, and has

" remained unpaid for a space of thirty days, or whenever " the Comptroller shall become satisfied of the insolvency " of a national banking association, he may, after due " examination of its affairs, in either case, appoint a " receiver who shall proceed to close up such association, " and enforce the personal liability of the stockholders, as " provided in section fifty-two hundred and thirty-four of " said statutes."

Revised Statutes.

" SEC. 5236. From time to time, after full provision " has been first made for refunding to the United States " any deficiency in redeeming the notes of such associa- " tion, the Comptroller shall make a ratable dividend of " the money so paid over to him by such receiver on all " such claims as may have been proved to his satisfaction " or adjudicated in a court of competent jurisdiction, and, " as the proceeds of the assets of such association are paid " over to him, shall make further dividends on all claims " previously proved or adjudicated; and the remainder of " the proceeds, if any, shall be paid over to the share- " holders of such association, or their legal representa- " tives, in proportion to the stock by them respectively " held."

Specification of Errors.

1.—The court of appeals erred in dismissing the appeal.

2.—The court of appeals erred in holding that the complainant was entitled to dividends upon an amount equal to the whole of its original debt, although more than half of it had been paid in cash.

3.—The court of appeals erred in not holding that the complainant's laches was such as to prevent it from maintaining its bill—and that its demand was stale; and that its remedy was at law.

BRIEF OF THE ARGUMENT.

I.

The court of appeals erred in dismissing the appeal.

There is jurisdiction of the circuit court in this case because it is a suit between a national bank and an "officer" of the United States (22 stat. 163, § 4, quoted above) and probably also because it is a suit "for winding up the affairs of" the bank (25 stat. 436, § 4, quoted above) as from the prayer and frame of the bill plainly appears.

It is thus *not* one of the cases in which the decree of the court of appeals is final (26 stat. 827, § 6, quoted above).

Jurisdiction to review the decision of the court of appeals upon the merits is, therefore, not only given but is "of right" (26 stat. 827, § 6, quoted above).

Nor can the case come up in any other way than through the court of appeals.

The cases in which an appeal may be taken from a circuit court to the Court are enumerated in section 5 (26 stat. 827, above quoted). This is not one of them. And section 6 provides that the circuit courts of appeals "shall exercise appellate jurisdiction to review by appeal "or by writ of error final decision in the district court "and the existing circuit courts in ALL *cases other than* "*those provided for in the preceding section of this act*, "unless otherwise provided by law" (26 stat. 827, § 6, "above quoted), and it is *not* "otherwise provided by "law."

Assuming its first decree to be not appealable, because not final, the decree dismissing the appeal must be appealable or the jurisdiction of the Court is defeated.

The decisions of the Court upon which the court of appeals has rested its decree—namely, that a decree en-

tered upon a mandate is not appealable—have not any application. In those cases the effect of an appeal would have been simply to force a rehearing upon the Court. If the court of appeals were the court of last resort the reason would apply, but it is not.

We have an appeal to the Court as "of right." If the first decree is not appealable the second must be.

Of course it is not any matter of concern to us which is the one which is appealable. In some form and in some shape an appeal lies and therefore one of the appeals must be good.

II.

The court of appeals erred in holding that the complainant was entitled to dividends upon an amount equal to the whole of its original debt, although more than half of it had been paid in cash.

This will be argued by Mr. Oldham.

III.

The court of appeals erred in *not* holding that the complainant's laches was such as to prevent it from maintaining its bill; and that its demand was stale; and that its remedy was at law.

The bill alleges that the complainant "offered to prove "up its claim for $10,000," "but under the ruling of the "comptroller of the United States of America, your

" orator was not allowed to prove its claim in full before " the defendant receiver, but was ordered to first exhaust " the collateral given to secure said loan for $10,000.00, as " aforesaid, and then to prove the claim for the difference " between the amount of the loan and interest, and the " amount realized from said collateral.

" *Under the ruling of the comptroller your orator* " *collected,*" upon the collateral $5,003.56, and :—

" That *after exhausting the collateral your orator proved* " *its claim for the balance,*" being $4,496.44—upon which it has received $2,033.39 in two dividends paid 1 December, 1892, and 17 May, 1893.

" *That the same rule was applied as to the other cred-* " *itors of the First National Bank of Palatka.*"

(*Italics* mine. R. in 54, p. 3.)

" *That your orator gave due notice that it would de-* " *mand a* pro rata *dividend upon the whole amount due* " *your orator, without deducting the amount collected on* " *collateral security.*"

(*Italics* mine, R. in 54, p. 4.)

The answer denies the last italicised allegation and alleges that " on the contrary thereof this defendant avers " the fact to be that the complainant *accepted the said* " *ruling of the said comptroller* without demur and " *accepted from the said comptroller, through this de-* " *fendant, without protesting notice of any kind; the* " *checks of the said comptroller in payment of the divi-* " *dends* mentioned in the bill, and that *it was not until* " *the 15th of March, 1894, that the complainant gave* " *notice of any kind that it dissented from* the said ruling " of the comptroller and would demand payment upon a " different basis; that since December 1st, 1892, *the said* " *comptroller has made disposition of the assets* of the " said bank in his hands in good faith, *believing that the* " *matter of his said ruling was at rest;*"

That the defendant "has transmitted to the said comptroller, as required by law, the sum of $143,849.03; "that there remains in the hands of this defendant the "sum of $907.55, which is subject exclusively to the "orders of the said comptroller, and that the remaining "assets of the said bank consist of sundry parcels of real "property and some securities and choses in action, many "of which are absolutely worthless, and the value of the "rest of which cannot be estimated."

(R. in 54, pp. 9-10.)

It thus appears:

That the bank failed 17 July, 1891.

That the complainant offered to "prove up its claim "for $10,000."

That the comptroller ruled that it could only prove for the balance after exhausting the collateral.

That it "accepted" the ruling of the comptroller.

That it then exhausted the collateral.

As the collateral consisted entirely of paper which had been discounted by the Palatka bank, this would have been done within two months from 5 June, as that was the time of the loan (R. in 54, pp. 2-3) that is to say, by the first of September, 1891.

That it then voluntarily proved its claim "to the satisfaction of the comptroller" for the balance, and received its two dividends without any sort of dissent.

By these two dividends the comptroller distributed all the assets, "believing that the matter of his said ruling "was at rest."

That there were other creditors who had collateral as to whom the same ruling was made and the same action taken and this bill was filed as well on their behalf as on behalf of the complainant.

The date of the final distribution is fixed by the date of the last dividend. It is seventeenth of May, 1893.

That it was not until nearly a year after this—the fif-

teenth of March, 1894—that the complainant gave any indication of dissent.

And not until September that it filed its bill—a period of three years and three months.

1. *The complainant made a promise, valid because based upon a good consideration—that is to say: the distribution of the assets to the other creditors—that it would take its dividends upon the basis of the amount of its claim left after "exhausting" its collateral.*

Under the ruling of the comptroller it collected from its collateral $5,003.56, and then proved its claim to the "satisfaction" of the comptroller for the balance—$4,496.44.

This would be about the first of September, 1891.

Upon this it received two dividends—1 December, 1892 and 17 May, 1893—amounting to $2,033.39. Of course it must have known that the comptroller must have been distributing the assets at the same time to all the other creditors—since the Act of Congress is that the comptroller should make from time to time *ratable* dividends upon *all* claims which have been proved to his satisfaction or adjudicated in a court of competent jurisdiction.

And it made no indication of dissent until the fifteenth of March, 1894, the comptroller having then distributed all the assets, except the $905, and the worthless assets, by the two dividends of 1 December, 1892, and 17 May, 1893.

This distribution is a good consideration for the promise which will be implied from the complainant's

First.—"Exhausting" the collateral.

Secondly.—Proving for the balance of its claim only.

Thirdly.—Standing by and seeing without objecting, the comptroller distribute the assets, taking at the same times its own two dividends upon that basis.

2. *The complainant's remedy, if it had any, was at law, and the bill should therefore have been dismissed for want of equity.*

The bill alleges "that the same rule" (the rule that the complainant should be allowed to prove only for the balance of its claim after it had exhausted its collateral) "was applied as to other creditors of the said First "National Bank of Palatka."

R. in 54, p. 3.

And it prays that "the defendant may be decreed to "pay to your orator (*and to all other creditors of said "First National Bank of Palatka in like situation, who "may come in and make themselves parties to this suit, "and contribute to the expenses thereof*)."

R. in 54, p. 4. Italics mine.

The bill is thus filed on behalf of all the other creditors who had collateral as well as on its own behalf.

If the $905 left were sufficient to pay the complainant, which it is not, *how about the others "in like situation," who have a right to come in?*

The bill prays

First, a discovery by the receiver of the assets which came into his hands—

Secondly, that he account for everything—

Thirdly, that he pay to the complainant *and the other creditors "in like situation"* a pro rata distribution upon the face of their claims—

Fourthly, that he wind up the affairs of the bank and his receivership without delay,

R. in 54, p. 4,

and there was a decree for an account and that the defendant pay,

R. in 54, pp. 17, 18.

The act of congress provides that the defendant shall convert the assets into cash and pay the cash into the

treasury to the order of the comptroller of the currency.

That is the whole of *his* duty

R. S., Sec. 5234 (quoted above)

and that "*the Comptroller* shall make a ratable dividend "of the money so paid over to him *by such receiver* on all "such claims as may have been proved to his satisfaction "*or adjudicated in a court of competent jurisdiction*,"

R. S., Sec. 5236.

Italics mine.

It is settled that if the claimant is dissatisfied with the ruling of the comptroller he may, in a suit *against the receiver*, have his claim "adjudicated by a court of com- "petent jurisdiction" and it will then become one of the claims upon which the comptroller is to make a "rata- "ble" dividend.

Bank *v.* Case, 100 U. S., 446.

Accordingly, the court of appeals, in this case, has reversed the whole of the decree of the circuit court and directed the entry of a decree simply establishing the amount of the claim, and that the receiver "pay the same "*or* certify the same to the Comptroller of the Currency "to be paid in due course of administration,"

R. in 54, p. 29,

which is the correct way—

Bank v. *Case*, 100 U. S., 446, 447, 456.

But this remedy is at law and a simple assumpsit.

Bank v. *Case*, 100 U. S., 446, 455.

When the court of appeals reversed all the decree but this, it therefore held that there was no equity in the bill and should have dismissed it, because there was an ade- quate remedy at law.

3. *The bill should have been dismissed for the* LACHES *of the complainant.*

Assuming that a bill in equity would lie to adjudicate a claim, it is certain that a simple assumpsit at law will also lie.

Bank v. *Case*, 100 U. S., 446, 455.

In this aspect of the case the remedies are concurrent, and the question now is how soon after the claimant knows that he has not proved his claim to the "satisfac-"tion" of the comptroller, must he sue.

If the complainant had sued at law possibly the law court might have felt itself bound to act in analogy to the state statute of limitations.

But it has not sued at law. It has come into equity; and there the rule is widely different.

It has come into equity after—1, three years and three months; 2, proving its claim for the balance only; 3, standing by and, without objection, not only seeing the comptroller distribute the assets, but taking its own share, "so that the said comptroller has made disposition "of the assets of the said bank in his hands in good faith, "believing that the matter of his said ruling was at rest."

(Answer—admitted, R. in 54, p. 9.)

In *McKnight* v. *Taylor*, 1 How., 161, 168, the Court, speaking by Mr. Chief Justice Taney, said (p. 168):

"For it is not merely on the presumption of payment, "or in analogy to the statute of limitations, that a court "of chancery refuses to lend its aid to stale demands. "There must be conscience, good faith and reasonable "diligence to call into action the powers of the Court, and "where these are wanting the Court is passive and does "nothing; and, therefore, from the beginning of equity "jurisdiction there was always a limitation of suit in that "court."

In *Mackall* v. *Casilear*, 137 U. S., 556, the Court, speaking by Mr. Chief Justice Fuller, said, p. 566:

"The doctrine of laches is based upon grounds of public policy, which require for the peace of society the discouragement of stale demands. *And where the difficulty of doing entire justice by reason of* the death of the principal witness or witnesses, or from *the original transactions having become obscured by time, is attributable to* gross negligence or *deliberate delay* a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence. *Jenkins* v. *Pye*, 12 Pet. 241; *McKnight* v. *Taylor*, 1 How. 161, 168; *Godden* v. *Kimmell*, 99 U. S. 201; *Landsdale* v. *Smith*, 106 U. S. 391; *Le Gendre* v. *Byrnes*, 44 N. J. Eq. 372; *Wilkinson* v. *Sherman*, 45 N. J. Eq. 413.

"The time for this son to have attacked his father on the ground of fraud was prior to that father's death; yet no movement was made to set aside these alleged fraudulent conveyances until five years after that event transpired. The father died testate, and by his will the property in controversy, subject to the Casilear conveyances, passed to the brothers and sisters of complainant as the father's devisees, who were natural objects of the bounty of the testator, and, so far as this record shows, entitled to his consideration. *The allegations of the bill fall far short of discharging the burden, which rested on the complainant, of satisfying the court that his delay had not operated to the prejudice of these parties.*

"Without regard to the deed of February, 1880, the rule in question would forbid relief, and, so far as that deed is concerned, complainant could not elect to take under it, and then claim that delay was excused *while he experimented in trying his case by piecemeal.* Of

" course it must be admitted that an affectionate son would " feel a natural reluctance to make a charge of fraud " against his father, but where the time consumed in over- " coming this is prolonged, as in this instance, we cannot " recognize the relationship as sufficient explanation of " the laches.

" These views are applicable to the defendants Casilear. " Casilear purchased at a sale under a trust deed given to " secure a note for $3,000, in respect to which there is no " allegation that the note was not for value received. The " excuse for the delay is that complainant protested " against Casilear's claim and notified him that he would " not submit to the sale; but the mere assertion of a " claim, unaccompanied by any act to give effect to it, " cannot avail to keep alive a right which would other- " wise be precluded. It is said, however, that complain- " ant had been engaged in negotiations from time to time " with Casilear, orally and by mutual correspondence in " writing, which complainant hoped would result in a " settlement and adjustment of their differences in regard " to the property held by him; but the bill does not state " that Casilear gave any encouragement to such hopes, " or ever promised any settlement or adjustment, or ever " conceded that his purchase was in any respect doubtful, " or ever in any way recognized the claim of the com- " plainant."

Italics mine.

That it is not the time alone which is of importance is well settled.

In *Hammond* v. *Hopkins*, 143 U. S. 224, the Court, speaking by Mr. Chief Justice Fuller, said:

(p. 250). "Each case must necessarily be governed by " its own circumstances, since, though the lapse of a " few years may be sufficient to defeat the action in one

" case, a longer period may be held requisite in another, " dependent upon the situation of the parties, the ex- " tent of their knowledge or means of information, great " changes in values, the want of probable grounds for " the imputation of intentional fraud, the destruction of " specific testimony, the absence of any reasonable im- " pediment or hindrance to the assertion of the alleged " rights, and the like."

And in *Whitney* v. *Fox*, 166 U. S. 637, the Court, speaking by Mr. Justice Harlan, said:

(p. 647) "Equity will sometimes refuse relief where a " shorter time than that prescribed by the statute of " limitations has elapsed without suit. It ought always " to do so where, as in this case, the delay in the " assertion of rights is not adequately explained, and " such circumstances have intervened in the condition " of the adverse party as render it unjust to him or " to his estate that a court of equity should assist the " plaintiff. It is impossible to doubt that Whitney " knew, for many years, while Lawrence was in proper " mental condition, that the latter did not admit, but " denied, that the former had any just demand against " him. But Whitney forebore to assert the rights which " he now asserts, and although having abundant oppor- " tunity to do so, and having, if his present claims are " just, every reason for promptness and diligence, he " nevertheless slept upon his rights and made no de- " mand upon Lawrence until disease had so far deprived " the latter of his reason and faculties that he could " not sufficiently comprehend any matter of business sub- " mitted to him. Under the peculiar circumstances of " this case, the court below rightly held that the plain- " tiff's laches cut him off from any relief in equity."

In *Penn Mutual Insurance Co.* v. *Austin*, 168 U. S. 685, the Court, speaking by Mr. Justice White, said:

(p. 698). "The reason upon which the rule is based "is not alone the lapse of time during which the neglect "to enforce the right has existed, but the changes of "condition which may have arisen during the period in "which there has been neglect. In other words, where "a court of equity finds that the position of the parties "has so changed that equitable relief cannot be afforded "without doing injustice, or that the intervening rights "of third persons may be destroyed or be seriously "impaired, *it will not exert its equitable powers in "order to save one from the consequences of his own "neglect.* The adjudicated cases, as said in *Galliher v. "Cadwell, supra*, 372, 'proceed on the assumption that "the party to whom laches is imputed has knowledge "of his rights, and an ample opportunity to establish "them in the proper forum; that by reason of his delay "the adverse party has good reason to believe that the "alleged rights are worthless or have been abandoned; "and that, because of the change in condition or rela- "tions during this period of delay, it would be an injus- "tice to the latter to permit him now to assert them.'"

Italics mine.

The facts of this case fit to every part of this rule. The defendant knew its rights. It had abundant opportunity to establish them in the proper forum—the comptroller of the currency had, by the delay and acceptance of the ruling and monies, good reason to believe that they were worthless or abandoned—and because of the change in the condition or relations during this period of delay—*i. e.*, the paying out of all the money without objection, it would be injustice, not only to the comptroller of the currency, but to those to whom the money was paid and distributed, to permit the right to be now asserted.

And in *Galliher* v. *Cadwell*, 145 U. S. 368, the Court, speaking by Mr. Justice Brown, said:

(p. 373) "But it is unnecessary to multiply cases. They "all proceed upon the theory that laches is not like "limitation, a mere matter of time; but principally a

" question of the inequity of permitting the claim to be " enforced—*an inequity founded upon some change in* " *the condition or relations of the property or the* " *parties.*"

Italics mine.

The case nearest like this in facts and in lapse of time—which has been found is

(*Ferson* v. *Sanger*, Davies, 252.) In that case Judge Ware said:

(p. 264) " It is nó denial of justice to leave the party to " such remedy as the law will give. Equity therefore " says to the suitor, that while the statute bar may not " be imperative, yet that in Equity there is a presumption " independent of the statute, not fixed to any invariable " time, but depending on the nature and circumstances of " the case, which may be a bar to equitable, when it would " not be to legal, relief. In these cases of concurrent " jurisdiction, Equity will not interpose with her extraor- " dinary powers unless the matter is brought before the " Court in such time as will leave to it the power of ad- " justing all the material equities involved in the case, in " such a manner that, while justice is done to one party, " injustice will not be done to another. If this cannot be " done, and this is the consequence of the delay, Equity " will not act on the right, but leave it for the decision of " law."

In that case there was a bill to recover back monies paid for a bond for the right of preemption of certain lands upon the ground that plaintiff "was induced by the " fraudulent misrepresentations of the defendants to pay " for their right an exorbitant price." It appeared that the plaintiff had gone into possession of the land, " mort- " gaged it, and finally allowed the mortgagees to fore-

"close and extinguish his title." So that of course, he could not restore the land to the defendants.

The bill was filed within the time of the statute of limitations.

The decrees should be reversed and the bill dismissed.

EDWARD WINSLOW PAIGE,
Of Counsel.

No. 54 and 55.

Brf. of Oldham for Appt.

Supreme Court of the United States.

October Term, 1898.

Filed Oct. 19, 1898.

T. B. Merrill, as Receiver of The First National Bank of Palatka, Appellant,

No. 54. vs.

The National Bank of Jacksonville.

T. B. Merrill, as Receiver of The First National Bank of Palatka, Appellant,

No. 55. vs.

The National Bank of Jacksonville.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT.

ARGUMENT AS TO APPLICATION OF COLLATERALS ON BEHALF OF APPELLANT.

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(16,486 and 16,487.)

W. H. ANDERSON & Co., Law Publishers, Cincinnati, Ohio.

SUPREME COURT OF THE UNITED STATES.

T. B. MERRILL, as Receiver of The First National Bank of Palatka, *Appellant*,

vs.

THE NATIONAL BANK OF JACKSONVILLE.

No. 54.

T. B. MERRILL, as Receiver of The First National Bank of Palatka, *Appellant*,

vs.

THE NATIONAL BANK OF JACKSONVILLE.

No. 55.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT.

STATEMENT OF THE CASE.

On the 17th day of July, A. D. 1891, The First National Bank of Palatka, a banking association incorporated under the laws of the United States, and having its place of busi-

ness at Palatka, Florida, failed and closed its doors. Subsequently T. B. Merrill, the appellant, was duly appointed receiver of said bank by the Comptroller of the Currency and entered upon the discharge of his duties. At the time of the failure of said bank it was indebted to The National Bank of Jacksonville, the appellee, in the sum of $6,010.47 for sundry drafts of The First National Bank of Palatka to the order of the appellee on the Hanover National Bank of New York, which indebtedness was unsecured, also in the sum of $10,000.00 and interest, for money borrowed June 5, 1891, which indebtedness was evidenced by a certificate of deposit and was secured by sundry notes belonging to The First National Bank of Palatka, attached to said certificate as collateral security. Said notes aggregated in amount $10,896.22, the largest being made by A. L. Hart for the sum of $5,350.22.

The appellee proved its claims upon the unsecured drafts for $6,010.47, as to which there is no controversy. It also offered to prove its claim for $10,000, being amount of certificate of deposit secured by collaterals, but the receiver would not permit the appellee to prove the full amount, but, under the ruling of the Comptroller of the Currency, the appellee was ordered first to exhaust the collaterals given to secure the certificate of deposit, and then to prove for the balance due after applying the proceeds of the collaterals in part payment. This was done. The appellee collected all the notes, except that of A. L. Hart, obtained a judgment upon the said note of A. L. Hart, which it assigned and transferred to the receiver, applied the proceeds of the collaterals which it had collected to its claim on the certificate, and proved only for the balance due thereon, being the sum of $4,496.44. On December 1,

1892, a dividend of $1,573.75 was paid on said claim, and on May 17, 1893, a second dividend of $449.64 was paid.

The Bill of Complaint, filed September 11, 1894, in the Circuit Court of the United States in and for the Southern District of Florida by the appellee herein against the appellant, sets forth all the foregoing facts and complains of the action of the receiver in not permitting proof for the full amount of the certificate of deposit, and alleges that the appellee "gave due notice that it would demand a *pro rata* dividend upon the whole amount due . . . without deducting the amount collected on collateral security, to wit: that it would demand a *pro rata* dividend upon $16,103.81, and interest thereon from the 17th day of July, A. D. 1891." The prayer of the bill is for, among other things, a *pro rata* distribution upon the entire amount of indebtedness. (Record, pp. 1–5.)

The oath of defendant was not waived in the bill of complaint, but he was required to answer upon his corporal oath. The defendant demurred to the bill as not containing any matter of equity, and as seeking to make proof of complainant's claim for the full amount, without deducting amounts received from proceeds of collateral securities collected prior to making proof. The demurrer was overruled by the court. (Record, p. 7.)

The answer of T. B. Merrill, as Receiver of The First National Bank of Palatka, to the said bill of complaint denies "that the complainant gave due notice that it would demand a *pro rata* dividend upon the whole amount due to it, without deducting the amount collected on collateral security." It avers that "the complainant accepted the said ruling of the said comptroller without demur, and accepted from the said comptroller, through this defendant, without protesting notice of any kind, the checks of the

said comptroller in payment of the dividends mentioned in the bill, and that it was not until the 15th of March, 1894, that the complainant gave notice of any kind that it dissented from the said ruling of the comptroller and would demand payment upon a different basis." The answer was duly sworn to. (Record, pp. 9–11.)

Sundry exceptions were taken to the answer for insufficiency, which were overruled, and the cause was set down for final hearing upon the bill and answer. (Record, p. 17.)

The Circuit Court adjudged that the complainant is entitled to a distributive share and dividend as one of the creditors of said First National Bank of Palatka, based upon, and to be calculated upon, the whole amount of the indebtedness due July 17, 1891. (Record, p. 17.)

The cause was appealed by the receiver to the United States Circuit Court of Appeals for the Fifth Circuit, where, June 15, 1896, it was reversed on account of the form of the decree and method of calculating interest, but said Circuit Court of Appeals affirmed the judgment of the Circuit Court as to the right of The National Bank of Jacksonville to be allowed dividends upon the full amount of the certificate of indebtedness, without regard to the collaterals, provided that the dividends paid and to be paid, together with the amounts received on the collaterals, should not exceed one hundred cents on the dollar on the principal and interest of said indebtedness. The receiver appealed from this decree of the Circuit Court of Appeals to this court, which appeal is numbered 16,486. (Record, p. 22.) A mandate was issued to the Circuit Court for the Southern District of Florida for further proceedings in accordance with said decree of the Circuit

Court of Appeals. (Record, No. 16,487, pp. 21–23.) A decree similar to the former decree, so far as it relates to the matter of collateral security, was entered by the Circuit Court on the 27th day of July, A. D. 1896. (Record, No. 16,487, pp. 23, 24.) From this decree a second appeal was taken to the Circuit Court of Appeals, Fifth Circuit, by the receiver, which was dismissed by the Court, December 8, 1896. (Record, No. 16,487, p. 30.) The Receiver of The First National Bank of Palatka has appealed also from said decree of dismissal to this court, which cause is numbered 16,487. (Record, p. 30.)

SPECIFICATION OF ERRORS.

It is the desire of the Comptroller of the Currency that the question as to the right of The National Bank of Jacksonville to participate in the distribution of the assets of The First National Bank of Palatka, as a creditor for the full amount of its claim on the certificate of indebtedness, notwithstanding its receipt of proceeds realized from collaterals after the failure of The National Bank of Palatka, may be presented by separate brief.

It is respectfully submitted that the Circuit Court and the Circuit Court of Appeals erred in not requiring the receiver to recognize The National Bank of Jacksonville as a creditor on said certificate of indebtedness, only for the amount due thereon after crediting thereon the proceeds of collaterals realized after the insolvency of The First National Bank of Palatka, and to pay it dividends accordingly.

ARGUMENT.

I.

The appellee is precluded by its conduct from claiming dividends upon the full amount of its certificate of indebtedness.

The Bill of Complaint avers that, when the appellee offered to prove its claim for the full amount of the certificate of indebtedness, the receiver, under the ruling of the Comptroller of the Currency, would not permit it to do so, but the claimant was "ordered to first exhaust the collateral given to secure said loan for $10,000, and then to prove the claim for the difference between the amount of the loan and interest and the amount realized from the collateral." This it did, and received dividends on the claim as proved. (Record, p. 3.) While it is averred in the bill that "your orator gave due notice that it would demand a *pro rata* dividend upon the whole amount," the answer, under oath not waived, says no objection was made to the ruling of the comptroller, and no notice of any demand for payment on a different basis was given until March 15, 1894. (Record, p. 9.)

This was not merely a waiver of appellee's right to prove for the full amount, if any such right existed, it was more.

The creditors of an insolvent national bank in the hands of a receiver are notified by the comptroller to present

their claims and make legal proof thereof. (U. S. Revised Statutes, Sec. 5235.) After provision has been made for refunding to the United States any deficiency in redeeming the bank's notes, the comptroller "shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." (*Ib.*, Sec. 5236.)

The claim, as appellee offered to prove it, was one concerning which the authorities are much in conflict. Rather than resort to a court of competent jurisdiction to establish its validity in the form desired, appellee elected to obtain a standing as a creditor by the satisfaction of the comptroller. By so doing it became, without litigation, the holder of a claim having all the force, validity and advantages of a *judgment.* As against The First National Bank of Palatka, the claim as proved became entitled to interest from the time it was proved to the satisfaction of the comptroller, the same as if adjudicated by a State, or United States, court.

National Bank of the Commonwealth v. Mechanics' National Bank, 94 U. S. 437.

In the case cited, referring to the claim of depositors to be paid interest in full on their claims, the assets being sufficient, Mr. Justice Swayne says, p. 439: "If these claims had been put in judgment, whether in a court of the United States or in a State court of that State, the result as to interest upon the judgment would have been the same. It was unnecessary to reduce them to judgment because they were proved to the satisfaction of the comptroller. After they were so proved they were of the same efficacy as judgments, and occupied the same legal ground."

Having voluntarily credited the proceeds of its collateral

in order to obtain the advantages of a judgment, appellee is estopped upon equitable principles from shifting its position.

One who obtains or defeats a judgment by pleading or representing an act in one aspect will be precluded from giving it a different and inconsistent character in a subsequent suit upon the same subject.

P. W. & B. R. Co. v. Howard, 13 Howard, *307, *337.

Martin v. Boyle, 49 Mich. 122.

Hooker v. Hubbard, 102 Mass. 239.

Perkins v. Jones, 602 Iowa, 345.

The same principle applies to awards upon matters in controversy submitted by the parties.

1 Freeman on Judgments, Sec. 320.

II.

If appellee is not estopped to assert a right to share as a creditor upon the full amount of its claim, the question is presented, whether a creditor, who is secured by collateral realized upon after insolvency of a national bank but before proving his claim, is required to credit upon his claim the amount so realized, or may he prove for the full amount, reserving the proceeds of his collateral to pay the balance due after crediting any dividends he may receive. As the facts appear from the Bill of Complaint, all the collateral notes, except that of A. L. Hart, were collected before actual proof was made. (Record, p. 3.)

Upon the general subject of the right of creditors holding collateral or mortgage security to participate in the distribution of insolvent estates, the authorities are in irreconcilable conflict. The subject has never been expressly considered in this court, although it seems to have been involved in The Cook Co. National Bank v. The United States, 107 U. S. 445, nor do the statutes relating to the distribution of the assets of insolvent national banks indicate any definite intention of Congress on the subject. The comptroller is simply required to "make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." U. S. Revised Statutes, Sec. 5236.

In the absence of statutory provision, there seems to be no substantial reason for any distinction in determining the rights of such creditors in the administration of insolvent estates, whether the insolvent is deceased, or has been adjudged a bankrupt, or has made an assignment for the benefit of his creditors, or is a corporation being wound up by the agency of a statutory or judicially appointed receiver. In all these cases the question is, what is the just and equitable amount of the claim which a creditor holding collateral security has as against a fund for distribution among creditors?

In discussing the subject in the light of the authorities, I shall assume, except where otherwise mentioned, that there is a single debtor, and that the security held was given by the debtor and not by a third person.

Decisions of greater or less weight can be found in support of each of the four following rules of distribution.

Rule 1. The creditor desiring to participate in the fund is required first to exhaust his security and credit the proceeds on his claim, or to credit its value upon his claim and prove for the balance, it being optional with him to surrender his security and prove for his full claim. This is known as the rule in bankruptcy, but has been followed by courts of high authority in many analogous cases.

Rule 2. The creditor can *prove* for the full amount, but shall receive *dividends* only on the amount due him at the *time of distribution* of the fund; that is, he is required to credit on his claim, as proved, all sums received from his security, and may receive dividends based only on the balance due him. This is the rule in several States and in Canada.

Rule 3. The creditor shall be allowed to prove for, and receive dividends upon, the amount due him *at the time of proving* or sending in his claim to the official liquidator, being required to credit as payments all sums received from his security prior thereto. This is the English rule, and is followed in many cases in the United States.

Rule 4. The creditor can prove for, and receive dividends upon, the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided that he shall not receive more than the full amount due him. This was the rule adopted by the lower courts in the case at bar, following the opinion of Judge Taft in The Chemical National Bank v. Armstrong, 59 Fed. 372.

The correctness of the judgment we are seeking to reverse depends on the validity of the fourth rule above stated. The first rule includes the second, and the second includes the third. If the creditor should be required first to exhaust or credit his security before proving his claim, *a fortiori* should he be permitted to share in the distribution only on the basis of the amount then due him, and if the amount due at the time of distribution is the proper criterion of his rights, *a fortiori* should he be required to credit on his claim such amounts as he has already received from his security prior to making proof. So far, then, as the argument of this case is concerned, the authorities divide themselves into those that favor the fourth rule and those that oppose it.

I shall attempt to show that the first, second and third rules are each more reasonable than the fourth; that the reasoning upon which it is founded is not only technical, but fallacious; that it is contrary to the weight of authority, and that it was not suggested by counsel or considered by this honorable court in an important case (Cook County National Bank v. The United States, *supra*), where its application would have materially affected the result.

If a debtor in failing circumstances desires to prefer a creditor, equity permits him to do so. It does not encourage or favor the transaction. If the debtor tenders the creditor a $1,000 bond in part payment of his claim it may be lawfully accepted and credited. If the creditor refuses to accept the bond as payment, but requests it as security,

the debtor may accede to such request. The same is true if, instead of a $1,000 bond, the debtor tenders $1,000 in money, for money can be specifically deposited as security. If the fourth rule is sound, the creditor is wise in refusing to accept it as *payment.* By taking the bond or money *as security* he can hold it back to supplement dividends on his full claim. That is to say, a *limited interest in property, taken out of what would otherwise have been assets for all, is worth more to him than absolute ownership in the same property.* The excess of value to him in the limited over the absolute ownership measures the unfair advantage which this fourth rule enables him to obtain over the other creditors.

Again, suppose that C, in failing circumstances, borrows of A $1,000, giving him collateral security of the value of $500, and borrows of B $1,000, without security. Here A increases the assets soon to be conveyed to a trustee by $500; B increases them by $1,000. If C's trustee is able to pay fifty cents on the dollar, A will receive payment in full, while B will receive only $500. If, by misfortune or otherwise, the assets had been entirely lost, by such loss A would lose $500, while B would lose $1,000. B's *risk* in such assets is twice as great as A's. It would seem but just for them to share in the distribution of the assets in the same ratio they would lose if there were none. As A's claim was secured by collateral having only half the value of the claim, it was *practically* only half secured. Equity is practical.

Much has been said about his caution in taking security deserving to receive its *full reward.* Under the operation of this rule, A, in the case supposed, who has taken security sufficient to pay only one half of his claim, fares as

well as the creditor who has taken full security. If caution is to be rewarded, the measure of reward ought to be proportionate to the amount of caution exercised.

The first rule, therefore, requiring the creditor to realize upon his security or credit its value, before recognizing him as a creditor having an equitable claim upon the assets, seems reasonable.

The second rule is, perhaps, more just than the first, when the collateral security can not be enforced before settlement of the insolvent estate, and the creditor has no power of sale. It obviates the objection of an enforced sale of the collateral, by valuation, to the secured creditor. It is based on the seemingly just principle that a fund to be distributed among creditors ought to be shared by them in proportion to the amounts due them respectively at the *time of distribution.* It is a corollary of the well-established principle which permits claims, growing out of a liability which was contingent at the time of the transfer of the assets to an assignee for the benefit of creditors, to share in such assets if the contingency happens before time of distribution.

Sweatman's Appeal, 150 Pa. St. 369.
Suppiger v. Gruaz, 137 Ill. 216.
Smith v. Goodman, 149 Ill. 75.
Parker v. Hull, 46 Ill. App. 472.
Hoyle v. Scudder, 32 Mo. App. 372.
Rea v. Jaffray & Co., 82 Iowa, 231.
Matter of Ives, 25 Abb. N. C. 63.

It is self-evident that, if a creditor of an insolvent debtor, after assignment but before dividend, should be fully paid

by the insolvent debtor out of his exemptions or future earnings, such creditor ought not to participate in the distribution. The cases above cited, as well as those hereafter cited directly in support of the second rule, regard *equal distribution among creditors having meritorious claims at the time of distribution* as the *paramount* object of the law, and treat as immaterial the amount of the claim at any time while the machinery of the law is in operation to accomplish its final purpose.

The chief merit of the third rule, as compared with the second, seems to be to lighten the labor of the liquidating officer. It fixes the amount of the claim as a basis for dividends, as it exists when proof is made, thereby rendering distribution mathematically more easy, but equitably more unjust. It is superior to the fourth rule in that it does not permit the creditor to make proof for the full amount of his claim when he has actually received part of it by realizing upon his collateral.

In regard to the fourth rule, it is said on behalf of the creditor holding collateral (1) that such collateral is simply *security* for the debt; that the creditor has the right, as against the debtor, to hold the security until the whole debt is paid; that he can sue the debtor personally, obtain judgment, levy execution upon his property, and reserve his collateral to realize any balance of his claim not collectible from the debtor's general property. Why, it is asked, should not his right be the same as against the receiver or

assignee in insolvency? His right to follow such property by execution is taken away by the transfer. He is deprived of the same right as other general creditors, and should have the same substituted right against the assets in the official liquidator's hands as other creditors.

Again, it is said (2) that, by the transfer, an equitable fund is created, of which the creditors are the equitable owners. Each creditor becomes an existing owner of a fractional share, the numerator of which is his claim *as it exists at the time of the transfer*, and the denominator of which is the aggregate of all the claims against the estate. Why should such ownership be affected by the receipt of money arising from his collateral, provided the amount received and the dividends do not more than pay his claim in full?

Furthermore, it is said (3) the collateral secures each and every dollar of his claim; so does the fund in the hands of the official liquidator; he therefore has a right to accept all he can get from either source and apply it on that part of his claim not paid from the other source.

Referring to the first argument, it entirely ignores certain duties arising from implied obligation on the part of the holder of collateral. It is true that, as between creditor and debtor, the creditor holding collaterals is not bound to resort to them or credit their value on his claim before enforcing his direct remedies against the debtor. Lewis, Trustee v. U. S., 92 U. S. 618, 623. But there is a third party interested, the party who is indebted upon the collateral. He has both a *right* and a *duty* to pay such collateral when it is due. The only person authorized to

receive payment is the holder of the collateral. It is his *duty* also to receive payment of the collateral when it is due and payment is tendered by the debtor upon the collateral.

Greenway v. Orthwein Grain Co., 85 Fed. 536.

What shall the creditor do with the proceeds of the collateral if it is less than the amount of his secured debt and is paid when the collateral falls due before the maturity of such debt? On the one hand, he is not bound ordinarily to accept payment of his claim, either before maturity or in installments. But here is money, perhaps a large sum, received by him through the very instrumentality by which he impliedly agreed to receive it by accepting the collateral. He must necessarily hold this money. Shall its use be lost? Shall he keep it intact in his own house or pocket (for if he deposits it in bank in his own name it becomes his own), or does the law apply it in part payment of his claim? If A owes B $1,000 not due, and B receives $900 of A's money applicable to the payment of the $1,000, it must be presumed that they did not intend that B should hold the $900 and still continue to draw interest upon the $1,000. And so the authorities hold.

Hunt v. Nevers, 15 Pick. 500.
Marine Bank v. Vail, 6 Bosw. 421.
Midgeley v. Slocomb, 32 How. Pr. 423.
Union Trust Co. v. Rigdon, 93 Ill. 458.
Joliet Iron Co. v. Scioto F. B. Co., 82 Ill. 548.
Cooper v. The Molson's Bank, 26 S. C. Can. 611.
Lamberton v. Windom, 12 Minn. 232.
Benning v. Thibaudeau, 20 Can. S. C. 110.
Thompson v. Hudson, L. R. 10 Eq. 497.
Assigned Estate of Wilhelm, 182 Pa. St. 281.

In Hunt v. Nevers, Chief Justice Shaw says, p. 504:

"It is a general rule that where collateral security is received for a debt, with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and receive, no act is necessary, and the law makes the application; if the proceeds equal or exceed the amount of the debt, it is *de facto* paid; no action would lie for it, and proof of these facts would support the defense of payment. It is like the ordinary case of a banker or factor, receiving securities of his principals, by indorsement or otherwise, on which he has a lien for his advances; when received, the proceeds operate as payment *pro tanto.*"

In Midgeley v. Slocomb, 32 How. Pr. 423, it is held that when a creditor who is secured by collateral realizes thereon it operates by law as payment *pro tanto*, and must therefore be *credited.*

The court say, in Joliet Iron Co. v. Scioto F. B. Co., 82 Ill., p. 549:

"The pledgé of commercial paper as collateral security for the payment of a debt does not, in the absence of a special power for that purpose, authorize the party to whom such paper is so pledged to sell the securities so pledged upon default of payment, either at public or private sale. He is bound to hold and collect the same as it becomes due and apply the net proceeds to the payment of the debt so secured."

The quotation is repeated and approved in Union Trust Co. v. Rigdon, 93 Ill. on page 465.

In Lamberton v. Windom, 12 Minn. 232, the court say, p. 242, with italics: "The contract carries with it an implication that the security shall be made *effectual to discharge the obligation.*"

In Cooper v. Molson's Bank, 26 S. C. Can. 611, Sir

Henry Strong says, p. 625: "Had I not been successful in finding an authority directly in point, I should, however, nevertheless have considered that a creditor who takes a collateral for less than the amount of his debt impliedly agrees that the money realized from such security shall be treated as a partial payment."

In Thompson v. Hudson, L. R. 10 Eq. 497, Sir Roundell Palmer argued that a mortgagee is not bound to receive payment in driblets, but Lord Romilly, M. R., shows the injustice of allowing a creditor to collect and hold money and yet charge interest for the full amount of his debt. In both the last-mentioned cases the creditor undertook to put the proceeds of collateral into a "suspense account."

In Colebrook on Collateral Security, Sec. 85, p. 169, it is said the *primary* purpose of collateral is to place in the hands of the creditor the means of reimbursement if default be made in payment of the principal indebtedness; and in Sec. 87 it is said the pledgee's duty is to apply the proceeds of the collateral when collected in payment of the principal debt.

In the Assigned Estate of Wilhelm, 182 Pa. St. 281, the assignee (a corporation) of an insolvent debtor was also one of the creditors, holding a promissory note for $15,000. The assignee held, as collateral security, stock, which it sold for $1,662.08, and a judgment, which it also realized by execution. It undertook to *hold* the proceeds without crediting them, so as to get more interest, but the court said, p. 283: "The company sold the stock held as collateral not as assignee, but as pledgee. Its power under the terms of the pledge was to sell and apply the proceeds to the payment of the note. This power it exercised, and it was bound to apply the proceeds at once. It

could not, after converting the stock into money, hold the money as collateral and allow interest to run on the note. The power to sell was that it might pay the note, and when it sold and received the money its claim to that extent was *extinguished.*"

Now, while it is not contended by the advocates for the collaterally secured creditor that if any collateral is *in fact* collected *before insolvency* it should not be deducted from his provable claim, yet no consideration has been given to the principle that equity considers that as done which ought to be done. If it is the debtor's duty to pay when the debt is due, and the creditor's duty to apply the proceeds on his claim, no reason is apparent why equity should not require these duties to be performed, if other general creditors will suffer from their non-performance.

In the case at bar it does not appear when the collateral notes became due. The appellee must be presumed to have set forth in its Bill of Complaint all the equities in its favor. The receiver and comptroller must be presumed to have done their duty. If the collateral notes described on page 2 of the record were due before the failure of The First National Bank of Palatka, then, at least, I submit the comptroller was right in requiring them to be collected and applied, as was done.

But, even if the collateral is not due before the insolvency or before proof is made of the creditor's claim, I respectfully submit it does not follow that, because the creditor has certain rights against the debtor, he has simi-

lar rights as against the fund. The argument overlooks the rights of other creditors. In the absence of legislation, what is the just amount of a creditor's claim against an equitable fund depends upon equitable principles. The creditor of a firm can follow the partner's individual property, but not when equity is administering insolvent firm and individual property. The whole doctrine of marshaling securities is opposed to the argument.

It is said, however, that equity will not require a creditor who has a lien on two funds to resort to one of such funds rather than the other, in favor of creditors having liens only on the latter, *when such requirement will result in loss to the creditor.* I respectfully submit that such argument begs the question, which is, *what is the amount* of the lien or equitable claim which the holder of security has as against the insolvent estate of his debtor?

Referring to the argument (2) that the creditor who holds collateral security has an equitable interest in the assets of the insolvent proportionate to the ratio his entire claim bears to the entire indebtedness, I respectfully submit that it is open to the same objection. It assumes that such creditor has a lien upon the fund for the entire amount of his claim, regardless of any amount that may be paid to him before he proves his claim.

He may elect never to pursue the fund. He may be satisfied with his collateral. Even an unsecured creditor may prefer to pursue an insolvent debtor personally rather than to share in his estate. In such event he does not *waive* his lien. He never acquires any. The law does not force liens upon creditors. It offers them an interest

in the nature of a lien, which they may accept by presenting to the official liquidator just and equitable claims.

A technical argument should at least be technically exact. If the creditor has an interest of such an exact nature at the time of the insolvency that it is inequitable to disturb it, such interest should be susceptible of measurement. The numerator only of the fraction is determinable. What the aggregate of claims is, or will be, is necessarily uncertain. Claims arising on contract but unliquidated at the time of insolvency, as well as claims arising out of a contingent liability which becomes absolute after the insolvency, are provable. Courts are liberal in permitting claims to participate in the distribution which had only an embryotic existence at the time of the transfer of the assets from the insolvent, as the authorities already cited show. By parity of reasoning they should be equally liberal in excluding or modifying claims the status of which has been changed between insolvency and distribution.

The argument (3) that every dollar of the creditor's claim is secured, both by the collateral and by the assets, and that therefore he can hold back what is realized from the collateral to apply in payment of any deficiency after full distribution of the assets, contains the same latent fallacy. It assumes that he has the same equitable interest in the assets, regardless of his collateral, or any payments to be made thereon, as an unsecured creditor.

That the right of the creditors in the assets is not measured by their claims against the *debtor* is shown by the matter of interest. Interest is allowed against the assets, if they are insufficient to pay the creditors, only to the date of insolvency.

White v. Knox, 111 U. S. 784.

If the assets are sufficient to pay the creditors in full, interest in full is to be paid *out of the assets* to date of payment. The date of insolvency is fixed because it is obviously just to the creditors *inter sese.* A creditor to whom the debtor had promised ten percent would have an unjust advantage over one whose claim was only drawing five percent, arising from necessary delay in the settlement of the estate. The date is fixed, not by statute, but by the courts, and by them, not for the technical reason that the trust is created at that time, but for the equitable reason that all the creditors should be treated alike and no one prejudiced by the law's delay.

The real question therefore is, what is a just and equitable rule for distributing the funds of an insolvent estate as between general creditors and those holding security?

The rule established by the courts under the earliest English Bankrupt Acts treated the interest of the holder of collateral security in the assets of the estate as it really and practically is. That is to say, if the creditor's security is ample, the bankruptcy of the debtor is a matter of indifference to him. He is interested in it to the extent that his security fails to secure him. He has a lien secured by his own vigilance, and the full amount of this lien not exceeding his claim was given to him by the court. He had not by vigilance secured any interest in the assets. It seemed just to the courts that, inasmuch as he had a lien, before they would give him another they should require him to exhaust or account for the one already held by him.

This idea of justice prevailed since the Act of 13 Elizabeth C. 7, and was approved and followed by the courts in bankruptcy in the United States without any statutory provision until the Bankrupt Act of 1867. That act embodied the rule in the statute.

One of the leading English cases under the "Winding-Up Acts" is Kellock's Case, L. R., 3 Chancery App. Cas. 769. Sir W. Page Wood, L. J., says, p. 778, the clause relating to distribution in the "Companies Act" of 1862 is "'equal distribution is to be made amongst creditors,' an expression similar to which in 13 Eliz. Ch. 7, appears to have led to the rule in bankruptcy." The learned Justice then shows that the earlier "Winding-Up Acts" expressly provide, p. 778, "that administration is to be according to the course in bankruptcy." This provision having been omitted in the later acts, including the Act of 1862, then under consideration, it was held that dividends should be paid to the holder of the collateral based upon the amount due to him at the time when his claim was sent in to the official liquidator.

This idea of justice is sufficient for our purposes in this case, but it was not acceptable to Parliament, which, in 1875, by the tenth section of the Judicature Act, re-established the rule in bankruptcy as the proper one to be followed in winding up companies. Mr. Lindley says the main object of the section was to place secured and unsecured creditors in the same position as in bankruptcy.

Lindley on Companies (5th Ed.), pp. 719, 720.

In 1813, Lord Eldon said, in *Ex parte* Smith, 2 Rose, 63, on p. 64:

"The practice has been long established in bankruptcy not to suffer a creditor holding a security to prove, unless

he will give up that security, or the value has been ascertained by the sale of it. The reason is obvious: till his debt has been reduced by the proceeds of that sale, it is impossible correctly to say what the actual amount of it is, and with this further consideration that, in the event of any doubt attaching upon his right to retain the security, he is enabled in a contest with the rest of the creditors to sustain his title in a situation of predominate advantage."

The distinguished Lord Chancellor's idea of the right of such creditor to participate in the bankrupt's assets so completely excluded the portion of his claim practically secured, that he terms the provable portion of the claim the "actual amount."

As has been tersely expressed, a creditor was not permitted in bankruptcy to claim both a whole of the part and a part of the whole. Such was the rule also in the United States, without any provision of statute, under the Bankruptcy Law of 1841. The Bankruptcy Acts of 1867 and 1898 expressly provide for the application of the rule, as does the present English Bankruptcy Act.

In addition to its approval on its merits by the courts of bankruptcy in this country and England, and by the legislation of Congress and Parliament and the legislatures of many of the States, the rule has been followed and approved in the following cases:

In re Frasch, 5 Wash. 344.

Moore v. Dunn's Adm'r, 92 N. C. 63.

Creecy v. Pearce, 69 N. C. 67.

Wurtz v. Hart, 13 Iowa, 515.

Willis v. Holland, Tex. Civ. App. (1896) 36 S. W. 329.

Bell v. Fleming's Executor, 1 Beasley, 13.

Field's Ex'r v. Creditors of Wheatley, 1 Snead, 351.

Winton v. Eldridge, 3 Head, 361.

Nat'l Union Bank of Md. v. Nat'l Mechanics' Bank of Balt., 80 Md. 371.

Amory v. Francis, 16 Mass. 308.

Farnum v. Boutelle, Adm'r, 13 Met. 159.

Middlesex Bank v. Minot, Adm'r, 4 Met. 325.

Haverhill Loan & Trust Co. v. Cronin, 4 Allen, 141.

Merchants' Nat'l Bank v. Eastern R. Co., 124 Mass. 518.

The American Nat'l Bank v. Branch, 57 Kans. 27.

The Security Investment Co. v. Richmond Nat'l Bank, 58 Kans. 414.

In re Frasch, Judge Dunbar, who pronounced the opinion, commenting on the rule that a creditor will not first be required to resort to one fund when he has a lien on two to his prejudice, says, p. 347: "But does he lose anything which was rightfully his by reason of his security, by compelling him first to exhaust his security and diminish his claim before he is allowed to resort to the general fund? We think not. Under this theory of the law" (the opposite rule) "a secured creditor is given an undue advantage of the unsecured creditors. Instead of being deprived of any of the benefits of his security, he is allowed their benefit in full, and in addition is allowed to use the security as an instrument to operate on and affect to his advantage the unsecured property."

In Moore v. Dunn's Adm'r, 92 N. C. 63, it is held that a mortgage creditor of a decedent must first exhaust his mortgage and look to the personalty for the residue. The

case follows and approves Creecy v. Pearce, 69 N. C. 67, where it is expressly held that the residue, after exhausting the mortgage, is to be paid ratably with other claims.

Wurtz v. Hart, 13 Iowa, 515, was an assignment case, and applies the rule without any limitation. It is expressly approved in Doolittle v. Smith (Sup. Ct. Iowa, Jan. 21, 1898), 73 N. W. 867.

Willis v. Holland, 36 S. W. 329, was a case where an insolvent debtor had made a conveyance to a trustee in trust to pay certain of his debts. The court say, p. 331, that such creditors have a right to have security held by one applied to his debt before he will be allowed to participate. It must be inferred that participation would be only upon the balance.

In Bell v. Fleming's Ex'rs, 1 Beasley, 13, Chancellor Williamson approves the rule on the broad ground that equality is equity.

In Field's Ex'r v. Creditors of Wheatley, 1 Snead, 351, and Winton v. Eldridge, 3 Head, 361, it is held that mortgage creditors of a decedent must first exhaust the mortgage, and for balance share *pro rata* with other creditors in the personalty.

The court in the recent case of Nat'l Union Bank of Maryland v. Mechanics' Bank of Baltimore, 80 Md. 371, not only approve as "just and equitable" the rule that distribution should be made on the basis of the amount then due, but require the secured creditor to exhaust or deduct the value of his security before proving his claim. It was a case of an assignment for the benefit of creditors, and much stress is laid on the inconvenience of permitting the secured creditor to participate for the full amount of his claim in the assets and afterwards to collect the full amount of his

collateral, with all the risk of his own insolvency when called upon by the assignee, from whom he has received dividends, to refund the excess above full payment.

In Amory v. Francis, 16 Mass. 308, Chief Justice Parker approves the rule in bankruptcy "as just and equitable." He says, p. 311 (italics mine): "This rule was adopted in England on account of its reasonableness and because consistent with the nature of the contract. For the property pledged is *in fact* security for no more of the debt than its value will amount to, and for all the rest the creditor relies upon the personal credit of his debtor in the same manner he would for the whole if no security were taken."

Farnum v. Boutelle, Adm'r, 13 Met. 159, decided in 1847, involved the right of a creditor holding a chattel mortgage to prove a claim against the estate of a decedent. Chief Justice Shaw pronounced the opinion. On page 164 he says: "If the mortgage remained in force at the time of the decease of the debtor, then it is very clear, as well upon principle as authority, that the creditors can not prove their debt without first waiving their mortgage, or in some mode applying the amount thereof to the reduction of the debt, and then proving only for the balance." There is no statute referred to, but Amory v. Francis is cited.

The same principle was approved in Middlesex Bank v. Minot, Adm'r, 4 Met. 325, without reference to statute, and in 1862, in Haverhill Loan & Fund Ass. v. Cronin, 4 Allen, 141, the same principle was held in the case of a mortgagee of real estate. Judge Hoar, on page 144, says it has been repeatedly so held in Massachusetts, citing Amory v. Francis and other cases.

In Merchants' Nat'l Bank v. Eastern R. R. Co., 124 Mass. 518, a statute was construed which authorized a

corporation to mortgage its property, etc., to secure its indebtedness. The trustees were to deliver certificates "in exchange for its existing debts and obligations to an equal amount as the same shall be ascertained and liquidated" by the trustees. The court say, p. 522: "There are no expressions in the act as to the extent or amount for which creditors whose debts are partially secured shall receive certificates." It is held, p. 524, that the holder of collateral is bound to deduct its value and receive certificate for the balance, approving Amory v. Francis.

In both of the Kansas cases the question arose under assignments for the benefit of creditors. In The American National Bank v. Branch, 57 Kans. 27, the court say, p. 35: "It would be inequitable to allow these claimants a *pro rata* dividend on the whole amount of their claims when payment of a part, if not all, of it may be received from the mortgage securities to which they have the exclusive right."

In The Security Investment Co. v. The Richmond National Bank, 58 Kans. 414, the court say, pp. 417, 418: "As the claimants held liens on property other than that assigned, they were not entitled to share equally in dividends with those who held no special security."

The following cases support the second rule, and, while not necessarily requiring the secured creditor to exhaust or value his security before proving his claim, hold that all sums realized from the security *before dividend*, shall be deducted and dividend made only on the basis of the balance due.

West v. Bank of Rutland, 19 Vt. 409.

Lowell v. French, 54 Vt. 193.

Bank v. Alexander, 85 N. C. 352.
Wheeler v. Walton & Whann Co., 72 Fed. 966.
In re Estate McCune, 76 Mo. 200.
Pa. Warehouse Co. v. Anniston Pipe Co., 106 Ala. 357.
London & San F. Bank v. Snell, 83 Fed. 603.
Wheat v. Dingle, 32 S. C. 473.
Third Nat'l Bank v. Lanahan, 66 Md. 461.
Erle v. Lane, 22 Colo. 273.
Whittaker v. Amwell Nat'l Bank, 52 N. J. Eq. 400.
Thibaudeau v. Benning, 20 S. C. Can. 110.
Doolittle v. Smith (Iowa, 1898), 73 N. W. 867.
State of Nebraska v. Nebraska Savings Bank, 40 Neb. 342.

These cases rest upon two propositions, (1) that what is realized from collateral operates as payment *pro tanto* on the principal debt, following the decisions already cited, and (2) that when a fund is to be distributed among creditors the material question is, who are creditors *at the time of the distribution.*

In West v. Bank of Rutland, a bill in equity was filed against a surety, who had received security to indemnify him and had realized upon such security, to compel him to apply the proceeds of the collateral upon the principal debt, so as to reduce the amount to be paid by the insolvent estate of the principal debtor. The bill was dismissed. The case is not directly in point, but Judge Redfield, who delivered the opinion of the court, discusses the right of a *creditor* who holds collateral to share in dividends from his insolvent debtor's estate. He says, p. 408: "One might have a claim against an estate which could not be resisted

at law, and upon which, nevertheless, he is not in equity entitled to a dividend." He further says, p. 409: "It is true that if the security has been converted into money, and it is between debtor and creditor, it ceases to be collateral and operates directly as payment; so that the debt is thereby reduced and the creditor can go only for the balance. This was the only remedy at the civil law. In England and in this country in such case the court of chancery will oftentimes compel the party to apply the funds in his hands and only proceed against the other funds for the balance, and if the proceeds are not money, will require them to be reduced to money."

In Lowell v. French, 54 Vt. 193, the creditor had proved for the full amount against the estate of both principal and surety. A dividend having been afterwards paid from the principal's estate, the creditor was required to deduct it and share only upon the balance in the surety's estate. The court say, p. 199 (italics mine): "In the distribution of an insolvent estate we see no reason why a payment made by the principal after the allowance should not be treated in the same way that it would have been if made before. In both cases the payment reduces the liability of the estate. While it is true that the payees had the right to regard the surety as a principal, and to enforce his liability as a principal until they had obtained full satisfaction, yet, *where there is only a limited fund from which to obtain satisfaction, and the question is made how that fund shall be distributed, creditors whose claims are equal in right are entitled to share equally in such distribution.*"

The case of Bank v. Alexander, 85 N. C. 352, is very similar to Lowell v. French. It is not clear from the report whether a dividend was received from the principal's estate before proof against the surety's estate or before dividend. It was received after *insolvency* of both principal and indorser, and the court required it to be deducted from the claim against the surety's estate.

As against principal and surety, maker and indorser, this was the well-established equitable rule in bankruptcy. A payment by the principal, or from his assets, reduced the claim if made before distribution of the surety's assets, but a payment from the surety's assets was no real reduction of the debt owing by the principal. Hence a just distinction was made when both principal and surety were bankrupts, and the claim was proved against both. The claim upon which dividends were paid from the surety's estate was always reduced by receipt of any sum from the *principal's* estate.

Blumenstiel on Bankruptcy, p. 287.

Ex parte Harris, 16 N. B. R. 432.

In re Babcock, 3 Story, 393.

This was an equitable and not a statutory rule, and goes much further than the rule for which I am contending. Where a creditor has two distinct *debtors* it is not inequitable, perhaps, that he should receive his full claim if the debtors are concurrently insolvent and each pays fifty cents on the dollar, even though such debtors are principal and surety, and some authorities so hold. But where the security has come from the insolvent debtor himself, is property which, if not security, would be part of the assets for general creditors, and property appropriated by both debtor and creditor to at least a potential payment of the debt, the case is much stronger for reduced dividends after part payment of the debt.

Wheeler v. Walton & Whann Co., 72 Fed. 966, was a decision by the Circuit Court of the United States for the District of Delaware. Judge Wales pronounced the opinion. It was a receivership case which is virtually the same, as the court say, so far as the rule for application of

collateral is concerned, as a case of assignment for the benefit of creditors. On page 967 Judge Wales says that by collecting the collateral notes before a dividend is made the creditor must credit the amount received and take a dividend on the balance only. The conflict of authorities is recognized, but in a note by the reporter it is said the court's attention was not called to the case of Levy v. The Chicago National Bank, 158 Ill. 88, hereinafter cited.

In re Estate of McCune, 76 Mo. 200, the question arose in the administration of the assets of an insolvent decedent's estate. The language of their statute is, p. 206: "If there be not sufficient to pay the whole of any one class, such demands shall be paid in proportion to their amounts." Creditors had realized upon their collaterals *after proving* their claims, but *before distribution.* (P. 200.) The court held that conversion of the collaterals into cash operated as payment *pro tanto*, and that dividends should be made on the balance only, and say, p. 206: "Any other construction than this would clearly contravene the plain language and teachings of the statute and result in an inequality of distribution which the statute neither contemplates nor tolerates." On p. 207 the court suggest a query as to the rights of such creditors to participate if they had not collected their collaterals.

Philadelphia Warehouse Co. v. Anniston Pipe Works, 106 Ala. 357, is a case where the assets of an insolvent corporation were in the hands of a receiver. After insolvency and appointment of the receiver the Warehouse Co., a creditor, collected a large sum on its collaterals. Whether such collection was made before or after proving its claim is not clear from the statement of facts, but the court treat that fact as immaterial and approve the rule that

where collaterals are collected before dividend the dividend should be made only on the residue of the claim.

In the London & San Francisco Bank v. Snell, Heitshu & Woodward Co. (U. S. Circuit Court for the District of Oregon), 83 Fed. 603, a receiver was appointed for the company upon the application of the bank, a creditor for a large amount, holding collaterals consisting of book accounts, whose claim had been recognized by the court by an order for payment of interest. Afterwards $7,000 was collected upon the book accounts. The court intimates that the weight of authority, perhaps, does not make the amount due at time of distribution the basis for dividends, but adopts that rule for the reason that the bank had received interest.

In Wheat v. Dingle, 32 S. C. 473, it is held that creditors of an intestate, who have realized upon their liens before dividends to general creditors, can share with such creditors only upon the balance due them. The court distinguish the case from prior cases in South Carolina, applying a different rule where there are *two debtors* bound for one debt, and say, p. 479: "But suppose the payments referred to, instead of having been made by *a third party*, had been made out of *the estate proper* of the debtor himself, would it be for a moment contended that such payments did not release that much of the deceased's assets originally liable to the creditor? It seems to us that such result would not only be in violation of all principle, but entirely unjust."

A recent case in the same state, Ragsdale v. The Winnsboro Bank, 45 S. C. 575, makes a distinction between payments from a principal's estate, after proof filed against both insolvent principal's and surety's estates, and payments from securities that came from the debtor's estate.

The court approves the ruling in Wheat v. Dingle, but shows the very just and equitable distinction between a rule that permits full dividends on the whole amount due when there are *two distinct debtors* (even though principal and surety) and a rule that permits such dividends when the creditor has received part payment out of the debtor's assets held by the creditor as security. The court say, p. 583 (italics mine): "We understand that the exceptions to so much of his Honor's decree as decided that creditors who hold collateral securities should be paid their *pro rata* dividend, regardless of the amounts they may have collected, or may yet collect, on said collaterals, has been abandoned. *This court, however, does not desire it to be understood that it assents to this rule of distribution.*"

In Third National Bank v. Lanahan, 66 Md. 461, the question arose under an assignment for the benefit of creditors, in which it was provided that the trustee was to pay the creditors in full, if the assets were sufficient, "if not, then ratably and equally, according to their respective amounts." This language (similar to that of the National Bank Act) the court, in a well-considered opinion, held to mean that the proceeds of all collaterals received before dividend should be deducted and dividends paid ratably on the balance. The case is approved in National Union Bank v. National Mechanics' Bank, 80 Md. 371, above cited, which goes further and requires the creditor to exhaust his collateral before proving his claim.

Erle v. Lane, 22 Colo. 273, is a recent, well-considered case, where, after proof against a decedent's estate, collateral was realized upon before distribution. The court of probate had permitted a dividend upon the original amount of the claim. This order was reversed. The court distinguish between cases of assignment for the benefit of cred-

itors and cases of decedent's estates (the statutes of Colorado making creditors in assignments *cestuis que trustent*). On page 279 the court say, after stating that the creditor may prove for the full amount (italics mine): "Yet if, before or *after* the claim is proved, he disposes of the security and realizes thereby a partial payment of the claim, *he has derived all the benefit it was intended to give*, and all that, under his contract, he is entitled to receive, and it no longer exists for any purpose. In other words, if he disposes of his collateral and puts it out of his power to return it in case his debt is paid, it ceases to be collateral, *and the sum realized operates as a payment* and reduces his claim *pro tanto*. By his own voluntary act he parts with the double right the law gives him, and thereafter can proceed only for the remainder of his claim, and is entitled to dividends only on that amount."

Whittaker v. Amwell National Bank, 52 N. J. Eq. 400, involves a large number of questions as to marshaling liens, one of which was the rights of general and secured creditors of one Jonathan Steward, who had assigned for the benefit of his creditors. It is a recent decision (1894) by Vice-Chancellor Bird. He says, p. 418: "Mr. Steward made assignment of certain securities which he held to different creditors as collateral security for their claims. What are their rights as against the general creditors of Mr. Steward? It is my judgment that they may file their claims with the assignee for the whole amount due them, without being compelled, in the first instance, to release their collaterals; but they are only entitled as against general creditors to a dividend out of the assets in the hands of the assignee upon the balance of their claim after having received the value of such collaterals."

The case of Thibaudeau v. Benning, 20 S. C. Can. 110, came up on appeal from the Queen's Bench of Montreal, where it is reported in Montreal L. R., 5 Q. B. 425.

It was a case under an assignment for the benefit of creditors and the question arose under the *common law*, as appears from Chief Justice Dorion's opinion in the Queen's Bench, p. 437. The Queen's Bench held, as expressed in the syllabus: "A creditor who holds notes or merchandise as collateral security is not entitled to be collocated upon the estate of his debtor in liquidation, under a voluntary assignment, for the full amount of his claim, but is obliged to deduct any sums he may have received from other parties liable on such notes, or which he may have realized upon the goods; and it does not matter at what time such sums have been received on account, provided it is before the day appointed for the distribution of the assets of the estate on which the claim is made." The decision is based on the ground that sums realized upon the collateral operate as payment *pro tanto*. The supreme court affirmed the decision of the Queen's Bench.

The case of Doolittle v. Smith was decided by the Supreme Court of Iowa, January 21, 1898 (73 N. W. 867). In an assignment case, after proof by a creditor, she realized a large sum upon her collaterals. The court cite Amory v. Francis, Wurtz v. Hart, and Bank v. Lanahan, *supra*, and hold that she was entitled to dividends on the balance only after applying the proceeds of her collaterals.

In The State of Nebraska v. Nebraska Savings Bank, 40 Neb. 342, the question arose on the distribution of the assets of an insolvent state bank. The court, after a full discussion of the question, in which they approve Amory v. Francis and *In re* Frash, *supra*, hold that collaterals, realized upon before distribution, must be deducted and dividends made only on the balance due, and that the creditor must surrender to the receiver the collaterals to be collected or disposed of as the court may order for the

benefit of the creditor. There was no statute bearing on the subject. Referring to the contention that the creditor should be allowed to draw dividends on his full claim, the court say, p. 350: "The secured creditor would obtain an advantage over the unsecured one, to which no rule of law or equity entitles him, and which can not be accorded him without working injustice to other parties."

The following authorities hold or approve the third rule that the creditor shall deduct from his claim the proceeds of any security realized before proving or sending in his claim to the official liquidator:

Furness v. Union National Bank, 147 Ill. 570.
Levy v. The Chicago National Bank, 158 Ill. 88.
Sohier v. Loring, 6 Cush. 548.
In re Meyers, 78 Wis. 615.
Kellock's Case, 3 L. R. Chan. App. 769.
In re Barned's Banking Co., 5 L. R. Chan. App. 18.
Fottrell v. Kavanagh, 10 Irish Rep. Eq. S. 256.
Eastman v. Bank of Montreal, 10 Ontario Rep. 79.
Cooper v. Molson's Bank, 26 S. C. Can. 611.

In Furness v. Union National Bank the court say, p. 573: "The creditor has a right to prosecute his claim for the full amount against the estate of the deceased debtor in the hands of the administrator, as he had a right to prosecute it for the full amount against the debtor when alive. Of course this right is subject to the condition that the whole amount of his claim is due to him when he files and proves it. If he has realized upon his collateral before

filing and proving his claim, he voluntarily parts with the double right secured to him by the law, and can only proceed for what is actually due to him; that is to say, for what remains of his claim after deducting the amount realized from the collaterals."

In Levy v. The Chicago National Bank, 158 Ill. 88, the English and American authorities are reviewed, and the court expresses its conclusion as follows, p. 102: "Our conclusion is, that the amount upon which the secured creditor is entitled to receive dividends from the assets of the insolvent estate is the amount actually due to the creditor when he files his proof of claim or presents his claim under oath; that the subsequent hearing upon objections or exceptions should be directed to the inquiry as to what was due at that date; that the amount due at that date is to be ascertained by the deduction from the principal debt of all payments made before that date, whether realized from collaterals or otherwise, but that amounts realized from collaterals after that date are not to be deducted, subject always to the qualification that the dividends received from the general assets and the amounts realized from the collateral security shall not together exceed the amount due the creditor upon his claim." The court expressly dissent from the statement of the learned judge who delivered the opinion in The Chemical National Bank v. Armstrong, 59 Fed. 372, that there is no logical basis for any distinction between the effect of collections made from collaterals after insolvency and before filing proof, and of those made after filing proof. They show that in Illinois, at least, creditors have no such "fixed" equitable ownership in the assets as will prevent its yielding to a payment received by the creditor before he proves his claim.

The plan of proving a fictitious amount—the amount *formerly* due—in order to obtain a dividend large enough

to pay what is *now* due may be logical, but it does not seem to be fair.

The English and Canadian cases cited show that this third rule of distribution is well established in both England and Canada. That is to say, in both countries the creditor must *at least* credit the proceeds of collaterals received *before proving* his claim. In Canada, however, as appears from Thibaudeau v. Benning, 20 S. C. Can. 110, cited above under the second rule, the creditor must also deduct all proceeds of collaterals received before *dividends*, prorating only on the balance. In England it seems to be settled by Kellock's Case, L. R. 3 Chan. App. 769, that proceeds of collaterals received after proof are not to be credited. The principal reason assigned is that the official liquidator might be tempted to delay dividends, hoping for the creditor to realize on his collaterals. I respectfully submit that this danger is not so imminent as the corresponding danger of *creditor* and *collateral debtor* agreeing to defer payment of collateral under the rule in Kellock's Case. The delay of the officer (liquidator or receiver) is *illegal*—a breach of his sworn duty. The delay of the others, creditor and collateral debtor, is but the legitimate adjustment of their private affairs so as to enable the creditor to reap the reward of a larger dividend offered by the law. He could well afford to be more lenient to the collateral debtor.

In re Barned's Banking Co., 5 L. R. Chan. App. 18, has a special bearing on the case at bar, as it is there held that proceeds realized from collaterals before *formal proof* to the official liquidator must be deducted from the amount on which dividends are based, although *before the proceeds were realized* the claim had been sent by a notary public to the official liquidator for *payment.*

The fourth rule, that the creditor shall be permitted to draw dividends on the full amount of his claim as it existed at the time of insolvency, regardless of payments since received from collaterals before or after time of proof, is supported by several cases in Pennsylvania. In The Chemical National Bank v. Armstrong the court supposed that Allen v. Danielson, 15 R. I. 481, was also a direct authority in support of the doctrine, but it clearly appears from the opinion of the court in that case, p. 483, that the mortgaged property by which the creditors were secured was sold *after* the first dividend, so that it is improbable that the question was before the court. Neither the learned court nor the able counsel in The Chemical National Bank v. Armstong were able to find any other authority for the proposition.

If the Pennsylvania doctrine is sound and applicable to the receivers of insolvent national banks, it is decisive of the question. But I respectfully submit it is not sound.

The foundation case cited and followed is Miller's Appeal, 35 Pa. St. 481. After an assignment in trust for creditors, one of the creditors attached a legacy, which was left to the insolvent debtor after the assignment, and having applied it on his debt, was thereafter permitted to prove for the original amount of his claim. Mr. Justice Strong says, p. 483: "It is not as a creditor that he is entitled to a distributive share of the trust fund. His rights are those of an *owner* by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determines the extent of his ownership. The reduction of that debt, therefore, after the creation of the trust and after his ownership had become vested, it would seem, must be immaterial. If it be suggested that the whole debt due Miller might have been paid by the

assignor after the assignment and before distribution, the answer is at hand: Miller's right to participate in the distribution at all is only a right in equity, it requires the aid of a chancellor, and that aid will not be given if the whole debt is paid."

That creditors have equitable rights in the trust fund; that they are in a sense *cestuis que trustent*, is clear. But that they are *owners*, with an ownership so fixed and absolute that it is entirely independent of the debt out of which their interest grows, unless the whole debt is extinguished, is not so clear. If "the amount of the debt due to him is important *only as it determines the extent of his ownership*," how can that debt have sufficient force and validity to be the foundation of an action to subject the legacy to its payment? If it is not *all* in full force and validity, how much of it is? Is it not clear that if the legacy had been not more than sufficient to pay the whole debt, the creditor could have recovered the full legacy? If, however, the debt *is* in full force, how can the creditor retain his claim unimpaired and undiminished, and at the same time *own* some of his debtor's property? Does the law or equity transfer property from the debtor to the creditor without affecting the debt? Again, suppose that the assets in the hands of the assignee should be stolen or lost by a cyclone, upon what *owner* would the loss fall? Such loss would disappoint and injure the creditor, but would no more affect his claim than if the property were being transmitted by the debtor's own agent instead of through the agency of the law.

I respectfully submit that the answer of the learned Justice to his own suggestion, about the effect of full payment of the debt on ownership, is not sufficient. It says, in

effect, that although this doctrine leads to a logical absurdity, the chancellor can avoid the consequences. If the debt, as it is reduced by payment, is permitted to measure the right to dividends, there will be no absurd consequences to require the chancellor's intervention.

The difference between paying the creditor a dividend upon his *whole claim* when it has *all* been collected, and paying the same dividend when a *part* of the debt is in his own pocket, seems to be not a distinction in equity, but simply a difference in the *degree* of injustice to other creditors.

When it is once admitted, as it is in Pennsylvania, Assigned Estate of Wilhelm, 182 Pa. St. 281, above cited, that the principal debt is in part *extinguished* by the proceeds of collateral received by the creditor, the whole argument, based on the right of the creditor to follow the assets as he could have followed the debtor, is inapplicable, and the logical advocate of the collaterally secured creditor's right so to manipulate his claim as to obtain dividends on the original amount is forced to resort to some technical theory which will give the creditor rights independently of the *debt*. The "fixed ownership" theory meets the situation. Any theory, which permits a creditor to obtain the full benefit of a whole claim when part of it is gone, seems utterly subversive of that nursery maxim of political economy, "You can not eat your cake and have it too."

Although this Pennsylvania doctrine has been repeatedly asserted by its courts, they have thrice failed to enforce the rigor of its logic.

In Sweatman's Appeal, 150 Pa. St. 369, a prospective landlord, at the request and for the accommodation of a prospective tenant, purchased a lot and erected a building

for the tenant, under an agreement that the tenant should lease the premises for a term of years to compensate the landlord. The lease was executed, binding upon executors, administrators and assigns, with covenants to pay rent and to terminate the lease for breach of covenants or conditions, without release of damages for such breach. Prior to the termination of the lease the tenant made an assignment for the benefit of his creditors, and the assignee abandoned the premises. The landlord was permitted to prove a claim for damages for failure to compensate him for his investment. Here there was no breach of any agreement *at the time of the assignment.* If creditors at the time of the assignment have a fixed ownership it is difficult to see how the landlord had any standing as a creditor.

In the Assigned Estate of Wilhelm, 182 Pa. St. 281, above cited, as to the effect on the debt of realizing on collaterals, the chancellor did even more than was suggested he might do by Mr. Justice Strong, in Miller's Appeal. The court would not permit the creditor, whose claim was partly paid by collateral realized after the assignment, although the creditor even refused to apply the proceeds of the collateral on his claim, to claim *interest* against the estate, to which he would have been entitled but for the payment. A very just decision, but justice came from the chancellor and not from the "fixed ownership" doctrine.

In a case decided by the Pennsylvania Superior Court, composed of seven judges, *In re* Wetzler's Estate, 3 Pa. Sup. Ct. 435, a creditor had obtained judgment against his debtor and levied execution on personal property, after which the debtor assigned for the benefit of his creditors. Before dividend the creditor realized part of his claim out

of the sale on execution. With this in his pocket he asked for a dividend on his whole claim. The court unanimously held that it should be deducted and his dividend paid only on the balance. The decision was based, not on the ground that the levy was a satisfaction *pro tanto*, but on the ground that the personal property levied upon did not pass to the assignee.

It seems that the Pennsylvania theory does not work smoothly in its practical application.

In favorable contrast with the case of Miller's Appeal is the case of Combs v. Union Trust Co., 146 Ind. 688. There the creditor, after an assignment in Indiana, went into another State and collected part of his claim by attaching property, which, however, was owned by the debtor at the time of the assignment. The Indiana court applied the proceeds, not on his claim, but on his *dividends* in the assignment case.

But if the Pennsylvania theory is correct as to an assignee in insolvency, it ought not to be applied to the receiver of a national bank and to the Comptroller of the Currency, who is required to make "a ratable dividend," and has not the power of a chancellor to neutralize the injustice of a logical theory.

But this is not a new question to this honorable court. It was involved in a case of great importance where the interests of the United States required the application of the rule that dividends should be paid by the receiver of a national bank regardless of collateral realized upon after the insolvency of the bank. This plan of distribution was

not suggested by counsel in the case, but the language of Mr. Justice Field indicates how the suggestion would have been treated if made.

Cook Co. National Bank v. The United States, 107 U. S. 445.

So far as the case cited bears on the question, the facts are as follows: At the time of the suspension of The Cook County National Bank, January, 1875, the Treasury Department of the United States held $150,000, par value, of United States bonds belonging to the Bank *as security* for all public moneys therein deposited. These bonds were, after the receivership, duly sold for $174,544.52 by the Treasury Department, and after paying *in full* the amount on deposit with the Bank to the credit of the Treasurer of the United States, there remained a balance of $19,239.05. At the time of failure the Bank had on deposit, of postal funds, $24,900, and of money-order funds, $14,684, deposited by the Deputy-Postmaster of Chicago. The Treasury Department applied the balance, $19,329.05, ratably on these two funds, leaving a balance due from the receiver on account of the two funds of $20,344.95. The officers of the United States being in doubt whether the said balance was a preferred debt under the U. S. Statutes, the United States filed a bill in the Circuit Court of the United States for the Northern District of Illinois against the Bank and its receiver, asking for a decree directing the disposition of the funds of the Bank in the control of the Treasury Department for distribution. The defendants treated the bill as if filed to obtain a *priority* in the payment of the *balance* due for postal funds and money-order funds. A demurrer to the bill was overruled by the Circuit Court and appeal was taken to the Supreme Court of the United

States, where the demurrer was sustained and the cause remanded for a dismissal of the bill. While the only question expressly considered was the question of priority, yet the scope of the bill was large enough to authorize a decree for a dividend upon the original amount of the claim for postal and money-order funds, if the United States was entitled to that relief, but no such decree was entered. Mr. Justice Field says, p. 449 (italics mine): "With these provisions for security against possible loss for moneys deposited, it would seem only equitable that the Government should call for such security, and, *if it prove insufficient*, take the position of other creditors in the distribution of the assets of the bank *in case of its failure*."

The italicized words indicate pretty strongly that the learned Justice did not disapprove of the treasurer's act in first exhausting the security and paying one claim *in full*, thereby disabling it, even under the Pennsylvania theory, from participating in dividends, nor is there the slightest suggestion that the claim for postal and money-order funds should be recognized for dividends in any larger sum than the amount due after applying the balance of the proceeds of the security.

While it does not appear in the record what assets the receiver held or what dividends he paid, it does appear that if the officers of the Treasury Department had withheld the full security, as appellee in the case at bar desires to do, a dividend of only eleven percent on the entire claims, together with the proceeds of the security, would have paid all the claims of the United States in full.

I respectfully submit, therefore, that the rule of distribution adopted in this cause in the United States Circuit Court of Appeals for the Fifth District is unsound in

principle and contrary to the great weight of authority, and that the judgment of said Court should be reversed.

Respectfully submitted,

FRANCIS F. OLDHAM,
Of Counsel for Appellant.

EDWARD WINSLOW PAIGE,
FRANCIS F. OLDHAM,
Counsel.

August 25, 1898.

No. 354.

Brief for Cooper for Appellee

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1897.

Filed April 21, 1898.

T. B. MERRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF PALATKA, APPELLANT,

vs.

THE NATIONAL BANK OF JACKSONVILLE, APPELLEE.

BRIEF FOR APPELLEE.

J. C. COOPER,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

T. B. Merrill, as Receiver of the First National Bank of Palatka, Appellant, vs. The National Bank of Jacksonville, Appellee.	In Equity, No. 300.

BRIEF FOR APPELLEE.

Statement of the Case.

This was a bill filed by the National Bank of Jacksonville against T. B. Merrill, as Receiver of the First National Bank of Palatka. The purpose of the bill was to establish a claim against the assets of the said First National Bank of Palatka in favor of the complainant below, appellee in this court, to-wit, that the said appellee, complainant bank, should be allowed to prove its claim, without regard to the collateral, for the amount of the claim as it existed at the moment of declared insolvency. The Receiver and Comptroller decided that the appellee could only prove its claim and receive dividends based upon the amount of its claim, after deducting the

amount received upon the collateral. The appellee contested this method of declaring dividends. This suit was brought to establish the right of the appellee to dividends based upon the total amount of its claim, without regard to collateral. The bill shows that the appellee was a creditor of the First National Bank for one class of indebtedness, consisting of sundry drafts, amounting to $6,010.47, and for another class of indebtedness, consisting of certificates of deposit, loans and interest, amounting to $10,093.34, making a total of $16,103.81 due the appellee from the First National Bank of Palatka on the 17th day of July, 1891. The appellee held certain collateral to secure the said last mentioned indebtedness of $10,093.34; said collateral amounting to $10,896.22, according to the face thereof. Complainant collected a portion of the collateral after insolvency of the bank, leaving a balance due on its said indebtedness, so secured by collateral of $4,496.44. The Receiver and Comptroller allowed the appellee dividends on this balance and dividends on the unsecured indebtedness, but refused to allow dividends on the total indebtedness from the date of insolvency, to-wit: based on the sum of $16,103.81. The contention of the complainant below, appellee here, was that the Receiver should have allowed the appellee to have proven its entire claim of $16,103.81, and should have received pro-rata dividends on the entire amount thereof.

This suit is framed upon the case of the Chemical National Bank vs. Armstrong, 59 Fed. Rep., 372. That is a bill in equity, and for the very identical purpose to attain which the bill in the case at bar was filed. The Court in that case held, as follows: "The great weight of authority in England and this country is strongly opposed to the view that a creditor with collateral will be thereby deprived of the right to prove for his full claim

against an insolvent estate" (quoting a number of authorities). "The exact point which is common to all of the foregoing authorities, and which they all sustain, is that a creditor who has proved his claim against an insolvent estate under administration can collect his dividends without any deduction from his claim as proven for collections made from collateral after his proof of claim is filed."

The bill was first demurred to, and the demurrer overruled, whereupon the Receiver filed his answer simply, in effect, alleging that he had no power to allow the claim. He did not deny that the complainant offered to prove its claim for the full amount when the claims were first presented, but only alleged that it did not express its dissent until the 15th of March, 1894. He answered that he had realized assets to the amount of $176,317.91; that he had paid, without stating when, the sum of $31,561.33 for expenses of the receivership; that he had transmitted to the Comptroller, without stating when, the sum of $143,849.03, and that some of the assets still remained in his hands undisposed of, but the Receiver failed to set out in his answer any statement of the assets remaining in his hands, or what assets remained in his hands on the 15th of March, 1894, or what disbursements he had made after the 15th of March, 1894, when he admits he had full notice of complainant's contention as to the proper mode of ascertaining and allowing dividends.

The Court overruled the exceptions to the answer, in effect holding, that the notice to the Receiver of complainant's right to dividends upon the basis of the entire indebtedness due to complainant was not given until the 15th of March, 1894. Thereupon the cause was set down upon the bill and answer and the Court made its decree in accordance with the case of Chemical National Bank

vs. Armstrong, declaring and adjudging the claim of the complainant, to wit: that it was entitled to receive from the assets of the First National Bank of Palatka, dividends upon the basis of its entire indebtedness of $16,103.81, but in order that no possible injustice should be done the Receiver, it further decreed that this dividend should be payable only out of the assets which were in his hands, when he admits he received notice of complainant's contention, to wit: on the 15th of March, 1894.

The Receiver did not in his answer state what assets he had on hand on the 15th of March, 1894, or what disbursements he had made after the 15th of March, 1894, or what moneys he had sent to the Comptroller after the 15th of March, 1894. The Court treating him as a trustee, ordered him to file an account showing the assets and disbursements on and after the 15th of March, 1894, the date on which he admitted receiving notice of complainant's claim.

The United States Court made its decree on the 29th of January, A. D. 1896 (found on pages 17 and 18 of the record).

On the 14th of March, 1896, the defendant below, T. B. Merrill, as Receiver, entered his appeal from the said decree to the United States Circuit Court of Appeals for the Fifth Circuit and assigned as error:

1st. The overruling of the demurrer to the bill.

2nd The entry of the said final decree (Page 18 of record).

On June 15, 1896, the United States Circuit Court of Appeals, Fifth Circuit, made its decree and filed its opinion reversing the decree of the Court below as to the form of the said decree, but establishing the right of

the appellee, complainant below, to prove its claims and to a pro rata distribution upon the entire amount of its indebtedness.(See pages 22 to 30 of record inclusive.)

For the decree and opinion of the United States Circuit Court of Appeals of Fifth Circuit see page 21 and from page 22 to page 30 of the record, inclusive.

The United States Circuit Court of Appeals followed the case of Armstrong vs. Chemical National Bank, 59 Fed. Rep., 372 (16 U. S. App. 465).

In the latter case, it was held that the creditors of an insolvent National Bank in proving their claims cannot be required to allow any credit for collection from collateral made subsequent to the declared insolvency of the Bank and before the filing of the proof of claim.

On December 24th, 1896, the defendant below, the appellant here, T. B. Merrill, as Receiver, entered his appeal to the Supreme Court of the United States from the said decree and opinion of the United States Circuit Court of Appeals.

This appeal should be dismissed.

This case and the case between the same parties, number 301, involve the same record and the same subject matter as shown by said records.

After the United States Circuit Court of Appeals made its opinion and decree, dated June 15, 1896, (Pages 21 to 30 of the record), as shown by the record in case No. 301 on the docket of this Court on page 22 thereof, the mandate of said United States Circuit Court of Appeals was sent down to the United States Circuit Court and filed in that Court July 16, 1896, and thereupon and

before any appeal had been taken to this Court from said decision of the United States Circuit Court of Appeals, a final decree was entered in this cause in the United States Circuit Court, in conformity with said mandate. (See pages 23 to 24 of the record.) And from that decree the said appellant Merrill took his appeal to the United States Circuit Court of Appeals.

This appeal should therefore have been dismissed upon the following grounds:

The record shows that the appellant here was also the appellant in both of the appeals in the United States Circuit Court of Appeals, shown by the records here in cases Numbers 300 and 301.

The first decree and judgment of the United States Circuit Court of Appeals was made on the 15th of June, 1896, and is reported in the Federal Reporter, Vol. 75, p. 148. The mandate of the United States Circuit Court of Appeals was filed in the Circuit Court of the United States for the Southern District of Florida, July 8th, 1896. (See page 20 of the record.)

The appellant Merrill did not then take any appeal from the decree and opinion of the United States Circuit Court of Appeals, but permitted the mandate to be sent down to the Court below and the decree entered thereon in the United States Circuit Court on the 27th of July, 1896. (See pages 23 and 24 of the record in Case No. 301 in this Court.)

Such decree having been entered in the Court below, in pursuance of said mandate, and the cause having been

by this action remanded to the jurisdiction of the United States Circuit Court, the appellant waived any right of appeal from said judgment of the United States Circuit Court of Appeals of June 15th, 1896, and he ought not to be heard in this Court to complain of same where said decree has been entered in strict conformity to said mandate.

Aspen Mining & Smelting Co., vs. Billings, 150 U. S. 34.

In re Washington & Georgetown R. R., 140 U. S. 91.

Gaines vs. Rugg, 148 U. S. 228, 241.

Texas & Pacific Ry. vs. Anderson 149 U. S. 237.

We will consider the errors as assigned in the United States Circuit Court of Appeals and shown in the record on page 18.

ARGUMENT.

First assignment and first specification of errors too indefinite.

The first assignment, found on page 18 of the record, is in the following language: "First. Because the Court erred in rendering the decree overruling defendant's demurrer to the bill of complaint herein."

The first specification is as follows: "First. The overruling of the defendant's demurrer to the bill of complaint."

This assignment and this specification point out no error that this Court will examine. The office of an assignment of error and of the specification in the brief is

to indicate in the said assignment and in the specification the exact question sought to be raised and which the Court is asked to decide. This Court and other Federal Courts have held that where the assignment and specification does not point out the exact question to be decided, it will not be considered.

Noonan vs. Caldonia Mining Co., 121 U. S., 400.

Patrick vs. Graham, 132 U. S., 627.

City of Lincoln vs. Sun Vapor St. Lt. Co., 59 Fed. Rep., 758.

F. C. & P. R. R. Co. vs. W. B. Cutting, et al., 68 Fed. Rep. 586.

If the Court shall determine to examine the demurrer to the bill, and the argument in the brief for appellant thereon, we maintain that the demurrer was properly overruled. In the argument, the only contention made against the bill seems to be in alleged indefiniteness in the allegations of the bill. No such ground was raised in demurrer, and it does not appear in the demurrer.

(See page 7 of the printed record.)

The three grounds set forth in the demurrer were:

1st. Want of equity.

2nd. A denial of the rule of distribution, which had been decided in the case of Chemical National Bank vs. Armstrong.

3rd. Estoppel.

None of these contentions were well taken. The bill is sufficiently definite to have settled and decreed the basis on which the complainant was entitled to a dividend. The bill states the total amount of the indebtedness due complainant. It states separately the amounts

for which it held collateral, and those which were unsecured, and it states the amount received on the collateral and separately the dividends on the two classes of claims, which the Comptroller and Receiver has allowed and paid. This data gave the Court everything needed upon which to frame a decree. On the points actually made in the demurrer, and which demurrer was overruled, we assert the Court properly decided the demurrer was not well taken.

Appellee was entitled to prove its claim for the full amount without regard to the collateral.

The case of Chemical National Bank against Armstrong (59 Fed. Rep. 372), decided by the Circuit Court of Appeals for the Sixth Circuit, is conclusive of this case. The facts in both cases are almost identical. In that case, just as in the case at bar, the Chemical National Bank, a creditor of the defunct Fidelity National Bank, held certain collateral, which Armstrong, the Receiver of the Fidelity Bank, required it to collect and apply to the debt. and then to make proof of the balance of the debt. The lower court sustained the view of the receiver, but the Appellate Court (consisting of Circuit Justice Brown and Judges Lurton and Taft) reversed the holdings of the lower court, and permitted the Chemical National Bank to prove its claim without regard to the collateral it held.

Judge Taft, speaking for the Court, asks in this opinion: "Shall creditors of an insolvent national bank, in proving their claims, be required to allow any credit for collections from collateral made subsequent to the declared insolvency and before proof of claim."

This question is answered in the negative, the same Judge saying:

"The great weight of authority in England and in this country is strongly opposed to the view that a creditor with collateral shall be thereby deprived of the right to prove for his full claim against an insolvent estate."

The opinion in this case is an able and exhaustive review of all the authorities on the subject, and is an authoritative exposition of the law of the case at bar.

See Chemical Nat. Bank vs. Armstrong, 59 Fed. Rep. 372, and cases there cited.

The elements of an estoppel are not present in this case.

It is objected by the demurrer that the complainant is estopped to bring this suit, although upon what grounds the alleged estoppel rests it is not clear.

The bill does not show that the Receiver has been led by the acts of the complainant to take any position, or do any act, which he would not otherwise have done, and which resulted in an injury to the rights of the creditors. It is particularly and specifically alleged in the bill: "That in addition to proving the amount of $6,010.47 due on sundry drafts as aforesaid, your orator offered to prove up its claim for $10,000.00, being amount of certificate of deposit secured by collateral as aforesaid, but the said defendant Receiver would not permit your orator to prove the total amount of $10,000.00 and interest due thereon for said loan as aforesaid, but under the ruling of the Comptroller of the United States of America your orator was not allowed to prove its claim in full before the defendant Receiver, but was ordered to first exhaust the collateral given to secure said loan for $10,000.00 as aforesaid, and then to prove the claim for the difference between the amount of the loan and interest, and the amount realized from said collateral."

"That your orator gave due notice that it would demand a pro rata dividend upon the whole amount due your orator, without deducting the amount collected on collateral security, to wit: that it would demand a pro rata dividend upon $16,103.81 and interest thereon from the 17th day of July, A. D. 1891."

Nothing could be more specific than the allegations contained in the bill that the defendant had full notice of the complainant's claim at the time proof was made. The fact that complainant was forced for the time, by a species of duress, to be governed by the rulings of the Receiver, did not invest this case with the qualities of an estoppel. The other creditors of the insolvent bank have not been harmed, but rather benefited, by the rulings of the Receiver, and for the complainant to endeavor now to assert a perfect legal right of which it had been deprived by the action of the Receiver, is as far as it possibly could be from a case of estoppel.

The same contention, which is sought to be made here against the complainant, was distinctly overruled by the Texas Civil Court of Appeals in the case of Hunt vs. Smart, 28 Southwestern Rep., 63, decided October 24th, 1894. In that case the appellee sought recognition as a preferred creditor, after having already proved his claim as a general creditor, the claim being sustained in the trial court. "The Receiver brings this case to us with the contention that the appellee has lost his right to a preference, and is estopped from claiming as a special creditor by reason of his action in proving up his claim before the Receiver, and allowing himself to be considered as a general creditor until after the assessment had been levied on each share of stock."

The Court dismissed the contention of the Receiver, saying: "That in order for an estopped to exist it must

appear that his action has led to a condition of things which would cause other creditors to lose some right if he is now being admitted to a preference."

It is true the payment of the claim in full, says this Court, would reduce the dividends of the other creditors, but the right of priority exists from the accrual of the preferred claim, and the remaining creditors lost no rights or advantages by allowing the appellee's claim, since they never had any rights or advantages over him. "On the contrary, if the appellee is refused preference, they (the other creditors) will acquire an advantage not justly due to them."

This reasoning applies with irresistible force to this case. Especially so, since the allegation is made with all possible distinctness that the complainant offered, in the first instance, to prove its claim for the full amount, which the Receiver would not permit.

This is a trust estate.

The trust sought to be enforced by the bill is still open and unexecuted. The Receiver was at the time the bill was filed, and still is, in possession of the assets of the defunct bank. The assets of the bank have not yet been fully distributed, and one of the grounds upon which this bill rests is the delay in closing the affairs of the bank. From the time of the payment of the first dividend to the filing of the bill there has been only one year and nine months, a period entirely insufficient to raise any presumption of laches by complainant.

It is shown by the bill that the Receiver is still in the active management of the bank. His position is that of a trustee administering an active trust, and any bene-

ficiary of that trust has a right to apply to the proper court to have the trust administered in accordance with law. So long as this trust is in the process of administration, the complainant has an undoubted right to have the Receiver's acts controlled by this Court. Any other doctrine would result in depriving the complainant and every other creditor of the bank of the protection of the Court from the unauthorized and illegal acts of an officer in the discharge of a trust.

"Laches is not like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded on some change in the conditions or relations of the property or the parties."

Galliher vs. Caldwell, 145 U. S., 368.

Godden vs. Kimmell, 99 U. S., 201.

Mackall vs. Casilear, 137 U. S., 556.

In this case the enforcement of the complainant's rights would work injury to no one. On the contrary, it would be highly inequitable to debar this, and all other creditors similarly situated, from availing themselves of the protection of this Court from the arbitrary and illegal acts of the Receiver.

The authorities cited by the appellants in the United States Circuit Court of Appeals to sustain the demurrer, to wit: Commonwealth vs. Mechanics National Bank, 94 U. S., 437, have no application. That was a suit by one bank against another, to wit: by a creditor bank against an insolvent bank for interest but it does not hold that the creditor may not treat the Receiver as the trustee of the property within the jurisdiction of the Court, and have its claim adjudicated in a suit against the Receiver.

The other case cited by the appellant in the United States Circuit Court of Appeals of Hitz vs. Jenks, 123, U. S., 297, in no respect sustains the demurrer to the bill. This was an effort by the receiver to enforce a deed in the nature of a mortgage, and to cancel certain deeds made after the mortgage, and by cross-bill by the defendant, Mrs. Hitts, to cancel the mortgage. The Court decided that the notary's certificate could not be disputed. which set forth the private examination of a married woman, and properly held that all of the rents of the property were applicable to the mortgage indebtedness. There is nothing in this decision which conflicts with the numerous decisions in which Receivers of national banks have been treated as trustees and sued as such.

The United States Circuit Court had power to enter a decree against the Receiver.

In the cases of Armstrong vs. American Exchange Bank, 133 U. S., 433, decrees against the Receiver Armstrong were affirmed.

In one case (see page 438) the prayer of the bill was for a decree that the claim with interest be adjudged a valid claim against the estate in the hands of the defendant as receiver, and that he be directed to satisfy it by paying dividends upon it from the assets of the Fidelity Bank. After a hearing on pleadings and proofs, a decree was entered (see page 439) directing the Receiver to allow the claim for the full amount against the assets in his hands as Receiver, and to satisfy it by paying such dividends as he had made theretofore and as should be made thereafter from the assets of the Fidelity Bank, in the due course of administration, and to pay the dividend of 25

per cent already declared with interest from that date to date of payment.

In the other case (see page 440) the prayer of the bill was for a decree that the claim is a valid claim against the assets in the hands of the defendant as Receiver, and that he be directed to satisfy it by paying dividends upon it from the assets of the Fidelity Bank in the due course of administration. The decree in this case, found on page 443 of the opinion, adjudges that the claim is a valid one for the full amount against the assets in the hands of the defendant as Receiver, and directs him to satisfy the same by paying thereon such dividends as had been made theretofore, and should be made thereafter from the assets of the Fidelity Bank in the due course of administration, and to pay the dividend *already declared*, with interest from that date until the time of payment.

The Court examined the facts in all these cases and decided (see page 459) that the decree in the first case was right, and on page 470 decided that the Circuit Court was right in making a decree against the Receiver in number 111 and affirmed the right of the complainant to interest on the dividend theretofore declared, and that both the decrees be affirmed.

In both of these cases demurrers had been interposed and overruled, dividends of 25% had been paid to the other creditors some time before these were adjudicated in favor of complainants in those suits, but the Court below and Circuit Court of the United States entered decrees against the Receiver, and ordered him to pay out of the assets not only the dividends thereafter accruing, but those theretofore accrued, with interest. We think it is therefore clear that the Receiver is treated as a trustee administering the assets of an insolvent estate, and when it

is necessary for a creditor to go into Court to establish his rights, he may get a decree against the assets.

Assets of insolvent banks subject to decrees of United States Courts.

In case of Richmond vs. Irons, 121 U. S. page 127, a bill by creditors to enforce stockholders liability was sustained and while the suit was pending, a receiver of the bank was appointed. The court treats the assets of an insolvent bank as subject to distribution under the decrees of a court of equity, on general equity principles.

In the case of National Bank vs. Colby (21 Wallace 609), it was determined that the title to the assets of the bank was transferred to the Receiver.

In the case of Pacific National Bank vs. Mixter, 124 U. S., page 724, the assets are treated as passing to the Receiver.

In Scott vs. Armstrong (146 U. S., 499) the Supreme Court of the United States upheld the right of set-off of creditors of the bank against suits brought by a Receiver of the bank.

If the Receiver can sue the debtors of a bank, and the debtor may by a cross action, in the nature of a plea of set-off, recover against the Receiver, there can be no reason why suit may not be maintained in the first instance by creditors of the bank against the Receiver for distribution of the assets of the bank.

The case of Hunt vs. Smart, 28 S. Rep., 63, is a suit against a Receiver of an insolvent National Bank, to establish a preferred claim, and was sustained by the Court of Civil Appeals of Texas.

The suit of People vs. Remington (121 N. Y., 328) is a similar action.

The Receiver is the only person in possession of the assets of an insolvent National Bank in the jurisdiction where the creditors reside, and where the bank is located, and most of its business, of course, is transacted. It would be inequitable to force creditors to carry on litigation in Washington against the Comptroller of Currency to compel the proper allowing of dividends and distribution of the assets, and this has never been held or required in any case that I am familiar with. The principle is well settled that the Court will not send citizens out of the jurisdiction to litigate in other jurisdictions, touching assets and property within the jurisdiction of the Court, but will control the administration of a trust fund within its jurisdiction, and the assets of an insolvent bank form no exception to this rule.

Second Assignment of Error.

The second assignment of error is that the Court erred in rendering final decree

We submit, under the authorities cited above, that this was a correct and proper decree. It was exactly the decree made in Armstrong vs. American Exchange Bank (133 U. S., 442), and the decree made in Chemical National Bank vs. Armstrong (59 Fed. Rep. 382). In the latter case, a rehearing was granted on other questions, but did not effect the decree as to the proper method of arriving at the dividend to be allowed. The decree on the hearing is found in 65 Fed. Rep., page 573.

The decree in the case at bar, complained of, is not repugnant to either section 5234 or section 5236 of U. S.

Rev. Stats., and the Supreme Court evidently so construed the statutes in the case that I have referred to.

The statutes clearly mean that in the ordinary administration of the assets of a National Bank, the Receiver shall send the assets to the Treasurer of the United States, and the Comptroller shall order the dividends, but it will be noted in section 5236 that creditors have a right to have their claims adjudicated in a Court of competent jurisdiction.

This construction of the statute contemplates the right of a creditor to go into Court and establish his claim. The Receiver should report this decree to the Comptroller, and for his own protection get the directions of the Comptroller authorizing the payment.

The United States Circuit Court of Appeals modified the decree of the United States Circuit Court, by directing that a decree should only be entered against the Receiver of the bank recognizing and establishing the claim of the complainant below, the National Bank of Jacksonville, and the mode of declaring the pro rata distribution. And the Circuit Court of Appeals further decided that the Receiver could not be compelled to make an accounting of the assets in the United States Circuit Court, and could not be compelled directly by decree to make payment, and in these respects the decree and opinion of the United States Circuit Court of Appeals are favorable to the appellant here, and he has nothing to complain of in the opinion or decree of the United States Circuit Court of Appeals.

The Receiver is entirely protected in reference to his duty to transmit the money to the Treasurer by the opinion of the United States Circuit Court of Appeals.

There are a number of cases treating Receivers of National Banks as trustees and the jurisdiction for that purpose has always been maintained.

See Commercial Bank vs. Armstrong, 148 U. S., 50.

Massey et al. vs. Fisher, 62 Fed. Rep., 958.

Fisher vs. Knight, 61 Fed. Rep., 491.

Lake Erie & W. R. Co. vs. Indianapolis Nat'l. B'k. et al., 65 Fed. Rep., 690.

These suits were not identical in nature with the suit at bar, but they show the extent to which Courts have gone in treating Receivers of National Banks as trustees of the assets in their hands.

This decree does not seek to make a personal liability against the appellant, but treats him as having the title to the assets as a trustee or bailee, for the purpose of winding up the bank. The amount of the principal of the indebtedness due from the First National Bank of Palatka to the appellee was not disputed, and therefore no suit against the First National Bank of Palatka was necessary to establish said indebtedness. The matter in dispute was the proportion of the assets of the insolvent bank, which the appellee was entitled to have applied upon its admitted claim.

It was, therefore, necessary in order to settle this question, to bring before the Court the custodian of these assets, and the person within the jurisdiction of the Court in possession of the assets and who had the management and transaction of the business of the defunct bank, and this person was the Receiver and he, as such Receiver and managing custodian of the business and assets could properly be treated by the Court as a trustee, in reference to those assets, and directed to certify the claim to the Comptroller for payment upon the basis of distribution directed by the Court.

The act of Congress, section 5236 of the United States Revised Statutes, distinctly provides for the Comp-

troller's making dividends on claims proven to his satisfaction, "*or adjudicated in a Court of competent jurisdiction,*" and that is all that the decree in this case, as modified, amounts to.

I submit, therefore, that there was no error in the opinion and decree of the United States Circuit Court of Appeals, from which an appeal is taken to this Honorable Court in this cause, and that the same should be affirmed.

Respectfully submitted,

J. C. Cooper

Solicitor for Appellee.

No. 304.

Brief of Cooper for Appellee

Filed April 21, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1897.

No. 301.

T. B. MERRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF PALATKA, APPELLANT,

vs.

THE NATIONAL BANK OF JACKSONVILLE, APPELLEE.

BRIEF FOR APPELLEE.

J. C. COOPER,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

T. B. Merrill, as Receiver of the First National Bank of Palatka, Appellant, vs. The National Bank of Jacksonville, Appellee.	In Equity, No. 301.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This was a bill filed by the National Bank of Jacksonville against T. B. Merrill, as Receiver of the First National Bank of Palatka. The purpose of the bill was to establish a claim against the assets of the said First National Bank of Palatka in favor of the complainant below, appellee in this court, to-wit, that the said appellee, complainant bank, should be allowed to prove its claim, without regard to the collateral, for the amount of the claim as it existed at the moment of declared insolvency. The Receiver and Comptroller decided that the appellee could only prove its claim and receive dividends based upon the amount of its claim, after deducting the

amount received upon the collateral. The appellee contested this method of declaring dividends. This suit was brought to establish the right of the appellee to dividends based upon the total amount of its claim, without regard to collateral. The bill shows that the appellee was a creditor of the First National Bank for one class of indebtedness, consisting of sundry drafts, amounting to $6,010.47, and for another class of indebtedness, consisting of certificates of deposit, loans and interest, amounting to $10,093.34, making a total of $16,103.81 due the appellee from the First National Bank of Palatka on the 17th day of July, 1891. The appellee held certain collateral to secure the said last mentioned indebtedness of $10,093.34; said collateral amounting to $10,896.22, according to the face thereof. Complainant collected a portion of the collateral after insolvency of the bank, leaving a balance due on its said indebtedness, so secured by collateral of $4,496.44. The Receiver and Comptroller allowed the appellee dividends on this balance and dividends on the unsecured indebtedness, but refused to allow dividends on the total indebtedness from the date of insolvency, to-wit: based on the sum of $16,103.81. The contention of the complainant below, appellee here, was that the Receiver should have allowed the appellee to have proven its entire claim of $16,103.81, and should have received pro-rata dividends on the entire amount thereof.

This suit is framed upon the case of the Chemical National Bank vs. Armstrong, 59 Fed. Rep., 372. That is a bill in equity, and for the very identical purpose to attain which the bill in the case at bar was filed. The Court in that case held, as follows: "The great weight of authority in England and this country is strongly opposed to the view that a creditor with collateral will be thereby deprived of the right to prove for his full claim

against an insolvent estate" (quoting a number of authorities). "The exact point which is common to all of the foregoing authorities, and which they all sustain, is that a creditor who has proved his claim against an insolvent estate under administration can collect his dividends without any deduction from his claim as proven for collections made from collateral after his proof of claim is filed."

The bill was first demurred to, and the demurrer overruled, whereupon the Receiver filed his answer simply, in effect, alleging that he had no power to allow the claim. He did not deny that the complainant offered to prove its claim for the full amount when the claims were first presented, but only alleged that it did not express its dissent until the 15th of March, 1894. He answered that he had realized assets to the amount of $176,317.91; that he had paid, without stating when, the sum of $31,561.33 for expenses of the receivership; that he had transmitted to the Comptroller, without stating when, the sum of $143,849.03, and that some of the assets still remained in his hands undisposed of, but the Receiver failed to set out in his answer any statement of the assets remaining in his hands, or what assets remained in his hands on the 15th of March, 1894, or what disbursements he had made after the 15th of March, 1894, when he admits he had full notice of complainant's contention as to the proper mode of ascertaining and allowing dividends.

The Court overruled the exceptions to the answer, in effect holding, that the notice to the Receiver of complainant's right to dividends upon the basis of the entire indebtedness due to complainant was not given until the 15th of March, 1894. Thereupon the cause was set down upon the bill and answer and the Court made its decree in accordance with the case of Chemical National Bank

vs. Armstrong, declaring and adjudging the claim of the complainant, to wit: that it was entitled to receive from the assets of the First National Bank of Palatka, dividends upon the basis of its entire indebtedness of $16,103.81, but in order that no possible injustice should be done the Receiver, it further decreed that this dividend should be payable only out of the assets which were in his hands, when he admits he received notice of complainant's contention, to wit: on the 15th of March, 1894.

The Receiver did not in his answer state what assets he had on hand on the 15th of March, 1894, or what disbursements he had made after the 15th of March, 1894, or what moneys he had sent to the Comptroller after the 15th of March, 1894. The Court treating him as a trustee, ordered him to file an account showing the assets and disbursements on and after the 15th of March, 1894, the date on which he admitted receiving notice of complainant's claim.

The United States Circuit Court made its decree on the 29th of January, A. D. 1896 (found on pages 17 and 18 of the record).

On the 14th of March, 1896, the defendant below, T. B. Merrill, as Receiver, entered his appeal from the said decree to the United States Circuit Court of Appeals for the Fifth Circuit and assigned as error:

1st. The overruling of the demurrer to the bill.

2nd The entry of the said final decree (Page 18 of record).

On June 15, 1896, the United States Circuit Court of Appeals, Fifth Circuit, made its decree and filed its opinion reversing the decree of the Court below as to the form of the said decree, but establishing the right of

the appellee, complainant below, to prove its claims and to a pro rata distribution upon the entire amount of its indebtedness (See pages 26 to 33 of the record). And its mandate to that effect was duly filed in the United States Circuit Court for the Southern District of Florida on July 6th, 1896 (see page 23 of the record), and thereupon on the 27th day of July, 1896, the United States Court for the Southern District of Florida entered its decree in said cause in exact conformity to the mandate of the United States Circuit Court of Appeals (see pages 23 and 24 of the record). And on the 26 of September said defendant below, the appellant here, entered his appeal to the United States Circuit Court of Appeals from said decree of the United States Circuit Court of the 27th of July, 1896, and assigned as error the provisions of the said decree (see pages 25 and 26 of the record).

On November 16th, the appellee filed its motion in the United States Circuit Court of Appeals to dismiss the said appeal (pages 27 and 28 of the record), and on December 8th, 1896, the United States Circuit Court of Appeals entered its order dismissing the said appeal and rendered its opinion thereon (found on pages 30 and 31 of the record, and from this order of the 8th of December, 1896, the present appeal to this Honorable Court is taken by Merrill, as Receiver, who was the defendant below, and also the appellant in the said United States Circuit Court of Appeals for the Fifth Circuit.

The United States Circuit Court of appeals followed the case of Armstrong vs. Chemical National Bank, 59 Fed. Rep., 372 (16 U. S. App. 465).

In the latter case, it was held that the creditors of an insolvent National Bank in proving their claims cannot be required to allow any credit for collection from

collateral made subsequent to the declared insolvency of the bank and before the filing of the proof of claim.

On December 24th, 1896, the defendant below, the appellant here, T. B. Merrill, as Receiver, also entered his appeal to the Supreme Court of the United States from the said decree and opinion of the United States Supreme Court of Appeals of June 15th, 1896, which appeal is case number 300 on the docket of this court now.

This appeal should be dismissed.

This being an appeal from a decree of the United States Circuit Court of Appeals for the Fifth Circuit *dismissing* an appeal in that Court, no appeal lies from such order to this Court.

Section 6 of the act of Congress of March 3, 1891, provides that the judgments and decrees of the Circuit Courts of Appeal shall be final in certain cases, naming them, and further provides for said Circuit Courts of Appeals certifying questions or propositions to the Supreme Court of the United States for its determination, and also provides for the Supreme Court, by certiorari, or otherwise, reviewing decrees of the Circuit Courts of Appeal. None of these provisions cover the case at bar. Said section 6 also provides as follows: "In all cases not hereinbefore in this section made *final*, there shall be the right to appeal, or writ of error, or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1,000, besides costs."

It is evident from the language of the act, as well as from its plain purpose, that this right of appeal only exists from *final* decrees involving the *merits* of a controversy.

The case at bar is an appeal from an order *dismissing* an appeal in the United States Circuit Court of Appeals and does not come within the meaning or purpose of the act of Congress.

An order dismissing an appeal is not the final judgment or decree referred to in the act of Congress from which an appeal lies to this Court.

See Aspen Mining and Smelting Co. vs. Billings, 150 U. S. 34. And case there cited.

This appeal should be dismissed upon another ground.

The record shows that the appellant here was also the appellant in both of the appeals in the United States Circuit Court of Appeals, shown by the records here in cases Numbers 300 and 301.

The first decree and judgment of the United States Circuit Court of Appeals was made on the 15th of June, 1896, and is reported in the Federal Reporter, Vol. 75, p. 148. The mandate of the United States Circuit Court of Appeals was filed in the Circuit Court of the United States for the Southern District of Florida, July 16th, 1896. (See page 22–23 of the record.)

The appellant Merrill did not then take any appeal from the decree and opinion of the United States Circuit Court of Appeals, but permitted the mandate to be sent down to the Court below and the decree entered thereon in the United States Circuit Court on the 27th of July, 1896. (See pages 23 and 24 of the record.)

Such decree having been entered in the Court below, in pursuance of said mandate, and the cause having been

by this action remanded to the jurisdiction of the United States Circuit Court, the appellant waived any right of appeal from said judgment of the United States Circuit Court of Appeals of June 15th, 1896, and he ought not to be heard in this Court to complain of same where said decree has been entered in strict conformity to said mandate.

Aspen Mining & Smelting Co., vs. Billings, 150 U. S. 34.

In re Washington & Georgetown R. R., 140 U. S. 91.

Gaines vs. Rugg, 148 U. S. 228, 241.

Texas & Pacific Ry. vs. Anderson 149 U. S. 237.

We will consider the errors as assigned in the United States Circuit Court of Appeals and shown in the record on page 18.

ARGUMENT.

The decree of the United States Circuit Court of Appeals dismissing the appeal referred to in the Court was properly made, and is in exact accord with the decisions of this Court in similar cases, as an examination of the opinion of the Circuit Court of Appeals will show.

Each of the assignments of error on the said appeal in the United States Circuit Court of Appeals, numbered 1, 2, 3 and 4 (pages 24 and 25 of the printed record) are in effect arguments by the appellant that the United States Circuit Court of Appeals erred in its first opinion dated June 15th, 1896, when the cause was first before it. The second appeal, therefore, from the decree of the United States Circuit Court to the United States Circuit

Court of Appeals amounted in effect to an appeal to the said United States Circuit Court of Appeals from its own previous decision, that is from itself to itself.

The Supreme Court of the United States, in the case of Stewart vs. Salaman, 97 U. S., 361, decided that an appeal would not be entertained in that court from a decree entered in the Circuit Court, or other inferior Court, in exact accordance with a mandate upon the previous appeal. Such a decree, when entered, would be in effect the order and decree of the Appellate Court. See also McKall vs. Richards, 116 U. S., 45.

If, however, this Honorable Court, on this appeal concludes to review the merits of the cause, we say the opinion and decree of the United States Circuit Court of Appeals of June 15th, 1896, and the decree of the United States Circuit Court of the 27th of July, 1896 (found on pages 23 and 24 of the record), made in pursuance of said opinion of the United States Circuit Court of Appeals are correct and should be affirmed.

First assignment and first specification of errors too indefinite.

The first assignment, found on page 18 of the record is in the following language: "First. Because the Court erred in rendering the decree overruling defendant's demurrer to the bill of complaint herein."

The first specification is as follows: "First. The overruling of the defendant's demurrer to the bill of complaint."

This assignment and this specification point out no error that this Court will examine. The office of an assignment of error and of the specification in the brief is

to indicate in the said assignment and in the specification the exact question sought to be raised and which the Court is asked to decide. This Court and other Federal Courts have held that where the assignment and specification does not point out the exact question to be decided, it will not be considered.

Noonan vs. Caldonia Mining Co., 121 U. S., 400.

Patrick vs. Graham, 132 U. S., 627.

City of Lincoln vs. Sun Vapor St. Lt. Co., 59 Fed. Rep., 758.

F. C. & P. R. R. Co. vs. W. B. Cutting, et al., 68 Fed. Rep. 586.

If the Court shall determine to examine the demurrer to the bill, and the argument in the brief for appellant thereon, we maintain that the demurrer was properly overruled. In the argument, the only contention made against the bill seems to be in alleged indefiniteness in the allegations of the bill. No such ground was raised in demurrer, and it does not appear in the demurrer.

(See page 7 of the printed record.)

The three grounds set forth in the demurrer were:

1st. Want of equity.

2nd. A denial of the rule of distribution, which had been decided in the case of Chemical National Bank vs. Armstrong.

3rd. Estoppel.

None of these contentions were well taken. The bill is sufficiently definite to have settled and decreed the basis on which the complainant was entitled to a dividend. The bill states the total amount of the indebtedness due complainant. It states separately the amounts

for which it held collateral, and those which were unsecured, and it states the amount received on the collateral and separately the dividends on the two classes of claims, which the Comptroller and Receiver has allowed and paid. This data gave the Court everything needed upon which to frame a decree. On the points actually made in the demurrer, and which demurrer was overruled, we assert the Court properly decided the demurrer was not well taken.

Appellee was entitled to prove its claim for the full amount without regard to the collateral.

The case of Chemical National Bank against Armstrong (59 Fed. Rep. 372), decided by the Circuit Court of Appeals for the Sixth Circuit, is conclusive of this case. The facts in both cases are almost identical. In that case, just as in the case at bar, the Chemical National Bank, a creditor of the defunct Fidelity National Bank, held certain collateral, which Armstrong, the Receiver of the Fidelity Bank, required it to collect and apply to the debt, and then to make proof of the balance of the debt. The lower court sustained the view of the receiver, but the Appellate Court (consisting of Circuit Justice Brown and Judges Lurton and Taft) reversed the holdings of the lower court, and permitted the Chemical National Bank to prove its claim without regard to the collateral it held.

Judge Taft, speaking for the Court, asks in this opinion: "Shall creditors of an insolvent national bank, in proving their claims, be required to allow any credit for collections from collateral made subsequent to the declared insolvency and before proof of claim."

This question is answered in the negative, the same Judge saying:

"The great weight of authority in England and in this country is strongly opposed to the view that a creditor with collateral shall be thereby deprived of the right to prove for his full claim against an insolvent estate."

The opinion in this case is an able and exhaustive review of all the authorities on the subject, and is an authoritative exposition of the law of the case at bar.

See Chemical Nat. Bank vs. Armstrong, 59 Fed. Rep. 372, and cases there cited.

The elements of an estoppel are not present in this case.

It is objected by the demurrer that the complainant is estopped to bring this suit, although upon what grounds the alleged estoppel rests it is not clear.

The bill does not show that the Receiver has been led by the acts of the complainant to take any position, or do any act, which he would not otherwise have done, and which resulted in an injury to the rights of the creditors. It is particularly and specifically alleged in the bill: "That in addition to proving the amount of $6,010.47 due on sundry drafts as aforesaid, your orator offered to prove up its claim for $10,000.00, being amount of certificate of deposit secured by collateral as aforesaid, but the said defendant Receiver would not permit your orator to prove the total amount of $10,000.00 and interest due thereon for said loan as aforesaid, but under the ruling of the Comptroller of the United States of America your orator was not allowed to prove its claim in full before the defendant Receiver, but was ordered to first exhaust the collateral given to secure said loan for $10,000.00 as aforesaid, and then to prove the claim for the difference between the amount of the loan and interest, and the amount realized from said collateral."

"That your orator gave due notice that it would demand a pro rata dividend upon the whole amount due your orator, without deducting the amount collected on collateral security, to wit: that it would demand a pro rata dividend upon $16,103.81 and interest thereon from the 17th day of July, A. D. 1891."

Nothing could be more specific than the allegations contained in the bill that the defendant had full notice of the complainant's claim at the time proof was made. The fact that complainant was forced for the time, by a species of duress, to be governed by the rulings of the Receiver, did not invest this case with the qualities of an estoppel. The other creditors of the insolvent bank have not been harmed, but rather benefited, by the rulings of the Receiver, and for the complainant to endeavor now to assert a perfect legal right of which it had been deprived by the action of the Receiver, is as far as it possibly could be from a case of estoppel.

The same contention, which is sought to be made here against the complainant, was distinctly overruled by the Texas Civil Court of Appeals in the case of Hunt vs. Smart, 28 Southwestern Rep., 63, decided October 24th, 1894. In that case the appellee sought recognition as a preferred creditor, after having already proved his claim as a general creditor, the claim being sustained in the trial court. "The Receiver brings this case to us with the contention that the appellee has lost his right to a preference, and is estopped from claiming as a special creditor by reason of his action in proving up his claim before the Receiver, and allowing himself to be considered as a general creditor until after the assessment had been levied on each share of stock."

The Court dismissed the contention of the Receiver, saying: "That in order for an estopped to exist it must

appear that his action has led to a condition of things which would cause other creditors to lose some right if he is now being admitted to a preference."

It is true the payment of the claim in full, says this Court, would reduce the dividends of the other creditors, but the right of priority exists from the accrual of the preferred claim, and the remaining creditors lost no rights or advantages by allowing the appellee's claim, since they never had any rights or advantages over him. "On the contrary, if the appellee is refused preference, they (the other creditors) will acquire an advantage not justly due to them."

This reasoning applies with irresistible force to this case. Especially so, since the allegation is made with all possible distinctness that the complainant offered, in the first instance, to prove its claim for the full amount, which the Receiver would not permit.

This is a trust estate.

The trust sought to be enforced by the bill is still open and unexecuted. The Receiver was at the time the bill was filed, and still is, in possession of the assets of the defunct bank. The assets of the bank have not yet been fully distributed, and one of the grounds upon which this bill rests is the delay in closing the affairs of the bank. From the time of the payment of the first dividend to the filing of the bill there has been only one year and nine months, a period entirely insufficient to raise any presumption of laches by complainant.

It is shown by the bill that the Receiver is still in the active management of the bank. His position is that of a trustee administering an active trust, and any bene-

ficiary of that trust has a right to apply to the proper court to have the trust administered in accordance with law. So long as this trust is in the process of administration, the complainant has an undoubted right to have the Receiver's acts controlled by this Court. Any other doctrine would result in depriving the complainant and every other creditor of the bank of the protection of the Court from the unauthorized and illegal acts of an officer in the discharge of a trust.

"Laches is not like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded on some change in the conditions or relations of the property or the parties."

Galliher vs. Caldwell, 145 U. S., 368.

Godden vs. Kimmell, 99 U. S., 201.

Mackall vs. Casilear, 137 U. S., 556.

In this case the enforcement of the complainant's rights would work injury to no one. On the contrary, it would be highly inequitable to debar this, and all other creditors similarly situated, from availing themselves of the protection of this Court from the arbitrary and illegal acts of the Receiver.

The authorities cited by the appellants in the United States Circuit Court of Appeals to sustain the demurrer, to wit: Commonwealth vs. Mechanics National Bank, 94 U. S., 437, have no application. That was a suit by one bank against another, to wit: by a creditor bank against an insolvent bank for interest but it does not hold that the creditor may not treat the Receiver as the trustee of the property within the jurisdiction of the Court, and have its claim adjudicated in a suit against the Receiver.

The other case cited by the appellant in the United States Circuit Court of Appeals of Hitz vs. Jenks, 123, U. S., 297, in no respect sustains the demurrer to the bill. This was an effort by the receiver to enforce a deed in the nature of a mortgage, and to cancel certain deeds made after the mortgage, and by cross-bill by the defendant, Mrs. Hitz, to cancel the mortgage. The Court decided that the notary's certificate could not be disputed. which set forth the private examination of a married woman, and properly held that all of the rents of the property were applicable to the mortgage indebtedness. There is nothing in this decision which conflicts with the numerous decisions in which Receivers of national banks have been treated as trustees and sued as such.

The United States Circuit Court had power to enter a decree against the Receiver.

In the cases of Armstrong vs. American Exchange Bank, 133 U. S., 433, decrees against the Receiver Armstrong were affirmed.

In one case (see page 438) the prayer of the bill was for a decree that the claim with interest be adjudged a valid claim against the estate in the hands of the defendant as receiver, and that he be directed to satisfy it by paying dividends upon it from the assets of the Fidelity Bank. After a hearing on pleadings and proofs, a decree was entered (see page 439) directing the Receiver to allow the claim for the full amount against the assets in his hands as Receiver, and to satisfy it by paying such dividends as he had made theretofore and as should be made thereafter from the assets of the Fidelity Bank, in the due course of administration, and to pay the dividend of 25

per cent already declared with interest from that date to date of payment.

In the other case (see page 440) the prayer of the bill was for a decree that the claim is a valid claim against the assets in the hands of the defendant as Receiver, and that he be directed to satisfy it by paying dividends upon it from the assets of the Fidelity Bank in the due course of administration. The decree in this case, found on page 443 of the opinion, adjudges that the claim is a valid one for the full amount against the assets in the hands of the defendant as Receiver, and directs him to satisfy the same by paying thereon such dividends as had been made theretofore, and should be made thereafter from the assets of the Fidelity Bank in the due course of administration, and to pay the dividend *already declared*, with interest from that date until the time of payment.

The Court examined the facts in all these cases and decided (see page 459) that the decree in the first case was right, and on page 470 decided that the Circuit Court was right in making a decree against the Receiver in number 111 and affirmed the right of the complainant to interest on the dividend theretofore declared, and that both the decrees be affirmed.

In both of these cases demurrers had been interposed and overruled, dividends of 25% had been paid to the other creditors some time before these were adjudicated in favor of complainants in those suits, but the Court below and Circuit Court of the United States entered decrees against the Receiver, and ordered him to pay out of the assets not only the dividends thereafter accruing, but those theretofore accrued, with interest. We think it is therefore clear that the Receiver is treated as a trustee administering the assets of an insolvent estate, and when it

is necessary for a creditor to go into Court to establish his rights, he may get a decree against the assets.

Assets of insolvent banks subject to decrees of United States Courts.

In case of Richmond vs. Irons, 121 U. S. page 127, a bill by creditors to enforce stockholders liability was sustained and while the suit was pending, a receiver of the bank was appointed. The court treats the assets of an insolvent bank as subject to distribution under the decrees of a court of equity, on general equity principles.

In the case of National Bank vs. Colby (21 Wallace 609), it was determined that the title to the assets of the bank was transferred to the Receiver.

In the case of Pacific National Bank vs. Mixter, 124 U. S., page 724, the assets are treated as passing to the Receiver.

In Scott vs. Armstrong (146 U. S., 499) the Supreme Court of the United States upheld the right of set-off of creditors of the bank against suits brought by a Receiver of the bank.

If the Receiver can sue the debtors of a bank, and the debtor may by a cross action, in the nature of a plea of set-off, recover against the Receiver, there can be no reason why suit may not be maintained in the first instance by creditors of the bank against the Receiver for distribution of the assets of the bank.

The case of Hunt vs. Smart, 28 S. Rep., 63, is a suit against a Receiver of an insolvent National Bank, to establish a preferred claim, and was sustained by the Court of Civil Appeals of Texas.

The suit of People vs. Remington (121 N. Y., 328) is a similar action.

The Receiver is the only person in possession of the assets of an insolvent National Bank in the jurisdiction where the creditors reside, and where the bank is located, and most of its business, of course, is transacted. It would be inequitable to force creditors to carry on litigation in Washington against the Comptroller of Currency to compel the proper allowing of dividends and distribution of the assets, and this has never been held or required in any case that I am familiar with. The principle is well settled that the Court will not send citizens out of the jurisdiction to litigate in other jurisdictions, touching assets and property within the jurisdiction of the Court, but will control the administration of a trust fund within its jurisdiction, and the assets of an insolvent bank form no exception to this rule.

Second Assignment of Error.

The second assignment of error is that the Court erred in rendering final decree.

We submit, under the authorities cited above, that this was a correct and proper decree. It was exactly the decree made in Armstrong vs. American Exchange Bank (133 U. S., 442), and the decree made in Chemical National Bank vs. Armstrong (59 Fed. Rep. 382). In the latter case, a rehearing was granted on other questions, but did not effect the decree as to the proper method of arriving at the dividend to be allowed. The decree on the hearing is found in 65 Fed. Rep., page 573.

The decree in the case at bar, complained of, is not repugnant to either section 5234 or section 5236 of U. S.

Rev. Stats., and the Supreme Court evidently so construed the statutes in the case that I have referred to.

The statutes clearly mean that in the ordinary administration of the assets of a National Bank, the Receiver shall send the assets to the Treasurer of the United States, and the Comptroller shall order the dividends, but it will be noted in section 5236 that creditors have a right to have their claims adjudicated in a Court of competent jurisdiction.

This construction of the statute contemplates the right of a creditor to go into Court and establish his claim. The Receiver should report this decree to the Comptroller, and for his own protection get the directions of the Comptroller authorizing the payment.

The United States Circuit Court of Appeals modified the decree of the United States Circuit Court, by directing that a decree should only be entered against the Receiver of the bank recognizing and establishing the claim of the complainant below, the National Bank of Jacksonville, and the mode of declaring the pro rata distribution. And the Circuit Court of Appeals further decided that the Receiver could not be compelled to make an accounting of the assets in the United States Circuit Court, and could not be compelled directly by decree to make payment, and in these respects the decree and opinion of the United States Circuit Court of Appeals are favorable to the appellant here, and he has nothing to complain of in the opinion or decree of the United States Circuit Court of Appeals.

The Receiver is entirely protected in reference to his duty to transmit the money to the Treasurer by the opinion of the United States Circuit Court of Appeals.

There are a number of cases treating Receivers of National Banks as trustees and the jurisdiction for that purpose has always been maintained.

See Commercial Bank vs. Armstrong, 148 U. S., 50.

Massey et al. vs. Fisher, 62 Fed. Rep., 958.

Fisher vs. Knight, 61 Fed. Rep., 491.

Lake Erie & W. R. Co. vs. Indianapolis Nat'l. B'k. et al., 65 Fed. Rep., 690.

These suits were not identical in nature with the suit at bar, but they show the extent to which Courts have gone in treating Receivers of National Banks as trustees of the assets in their hands.

This decree does not seek to make a personal liability against the appellant, but treats him as having the title to the assets as a trustee or bailee, for the purpose of winding up the bank. The amount of the principal of the indebtedness due from the First National Bank of Palatka to the appellee was not disputed, and therefore no suit against the First National Bank of Palatka was necessary to establish said indebtedness. The matter in dispute was the proportion of the assets of the insolvent bank, which the appellee was entitled to have applied upon its admitted claim.

It was, therefore, necessary in order to settle this question, to bring before the Court the custodian of these assets, and the person within the jurisdiction of the Court in possession of the assets and who had the management and transaction of the business of the defunct bank, and this person was the Receiver and he, as such Receiver and managing custodian of the business and assets could properly be treated by the Court as a trustee, in reference to those assets, and directed to certify the claim to the Comptroller for payment upon the basis of distribution directed by the Court.

The act of Congress, section 5236 of the United States Revised Statutes, distinctly provides for the Comp-

troller's making dividends on claims proven to his satisfaction, "*or adjudicated in a Court of competent jurisdiction*," and that is all that the decree in this case, as modified, amounts to.

I submit, therefore, that there was no error in the opinion and decree of the United States Circuit Court of Appeals, from which an appeal is taken to this Honorable Court in this cause, and that the same should be affirmed.

Respectfully submitted,

J. C. Cooper

Solicitor for Appellee.

No. 54 and 55.

Brf. of Yeaman v Worthington for Appellee (by leave of J. C. Cooper)

Supreme Court of the United States,

October Term, 1898.

Filed Oct. 18, 1898.

No. 54.

T. B. MERRILL, as Receiver of the FIRST NATIONAL BANK OF PALATKA,

Appellant,

vs.

THE NATIONAL BANK OF JACKSONVILLE,

Appellee.

No. 55.

T. B. MERRILL, as Receiver of the FIRST NATIONAL BANK OF PALATKA,

Appellant,

vs.

THE NATIONAL BANK OF JACKSONVILLE,

Appellee.

APPEALS FROM CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ARGUMENT ON BEHALF OF APPELLEE AS TO APPLICATION OF COLLATERALS.

WILLIAM WORTHINGTON,
GEORGE H. YEAMAN,
Of Counsel for Appellee.

The Evening Post Job Printing House, New York.

Supreme Court of the United States,

OCTOBER TERM, 1898.

T. B. MERRILL, as Receiver of the First National Bank of Palatka, vs. THE NATIONAL BANK OF JACKSONVILLE.	Nos. 54 and 55.

ARGUMENT SUPPORTING DECISIONS BELOW AS TO BASIS FOR DIVIDENDS.

In the case of the Chemical National Bank *v.* David Armstrong, Receiver of the Fidelity National Bank, 16 U. S. Appeals, 465, the Circuit Court of Appeals for the Sixth Circuit had held in November, 1893, that a secured creditor of an insolvent national bank might prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom after the declaration of insolvency, subject always to the proviso that dividends should cease when therefrom and from collaterals realized the claim had been paid in full.

The same question being presented to the Circuit Court of Appeals for the Fifth Circuit in the cases at bar, that

Court reached the same conclusion, saying, 41 U. S. Appeals, 529:

"From an examination of many of the cases cited and reviewed in Armstrong *v.* Bank, *supra*, as well as a consideration of the reasoning therein, we are compelled to concur with the rule as declared in that case."

The decision of this Court in the case of Western National Bank *v.* Armstrong, 152 U. S., 346, as to the powers of a national bank and its officers to borrow money, led to a remanding of the Fidelity National Bank case for further proofs. The cause coming again before the Court of Appeals, the validity of the claim was sustained and the prior decision as to dividends reaffirmed (54 U. S. Appeals, Nos. 31 and 32, p. 462), and an appeal has been taken by the Receiver of that bank from this last decree which is now pending in this Court, No. 279 upon the docket of this term (General Docket No. 16,849).

We have been counsel for the Chemical National Bank throughout this litigation. After the last decree of the Circuit Court of Appeals, Mr. F. F. Oldham was retained by the Comptroller of the Currency as additional counsel for the Receiver in that case, and later as additional counsel for the Receiver of the Palatka Bank in the cases at bar. Mr. Oldham and Mr. Paige have prepared and filed in the Palatka Bank cases an argument devoted almost exclusively to the single question which is common to those cases and the Fidelity Bank case, viz., the rule as to computation of dividends. Mr. J. C. Cooper, counsel for the appellee, has courteously permitted us to appear as his associates. Naturally our argument will be, in a large measure, a review of and response to that of Messrs. Oldham and Paige, and will be confined to the rule as to computation of dividends.

There are four different rules of distribution which have hitherto met support. These have been accurately stated in the brief of Messrs. Oldham and Paige as follows (Brief, p. 10, italics his).

"RULE 1. The creditor desiring to participate in the fund is required first to exhaust his security and credit the pro-

ceeds on his claim, or to credit its value upon his claim and prove for the balance, it being optional with him to surrender his security and prove for his full claim.

RULE 2. The creditor can *prove* for the full amount, but shall receive *dividends* only on the amount due him *at the time of distribution* of the fund; that is, he is required to credit on his claim, as proved, all sums received from his security, and may receive dividends based only on the balance due him.

RULE 3. The creditor shall be allowed to prove for, and receive dividends upon, the amount due him *at the time of proving*, or sending in his claim to the official liquidator, being required to credit as payments all the sums received from his security prior thereto.

RULE 4. The creditor can prove for, and receive dividends upon, the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided that he shall not receive more than the full amount due him."

For convenience we shall call Rule 1 the *bankruptcy rule*, because it had its origin in statutes of bankruptcy; Rule 2 the *partial payment rule*, because it computes the basis for each successive dividend according to the ordinary principle of partial payments; Rule 3 the *Kellock's case rule*, because it was first announced in that case, L. R., 3 Ch., 769; and Rule 4 the *equity rule*, because it has been the rule adopted by courts of equity where the matter is not affected by statute, and is still supported by the weight of authority. The statement of Rule 4 as to collections from collateral "after the transfer of the assets" from the insolvent debtor, must be understood as meaning after the date at which the debtor's power over the assets ceases, and they become impressed with the trust for creditors. In legal effect the two statements are, of course, equivalent, as the transfer when made has relation to the other date, if that be precedent. We mention the matter, however, so that there may be no misapprehension as to the ground upon which we accept the statement of the rule as correct; for if contention were made that the time to be regarded as the actual transfer as distinguished from the period to which it relates, we should state the rule differently.

Before proceeding farther with the discussion, it is

proper that we should call attention to the fact that the reason running through the whole of the brief for appellant, as to why the first, second and third rules should be preferred to the fourth, is that were it not for the pledge, the collateral security would have gone to enhance and increase the assets of the insolvent bank; and practically it admits that if this was not the case, if the insolvent bank had no beneficial interest in the property pledged, then no reason would exist why the creditor should be forced to exhaust the collateral, or apply collections from it, to the exoneration of the assets passing under the assignment; in other words, that in such cases, the fourth rule, as stated by counsel for appellant, is the proper rule to be applied. We mention this because the collections made by the Chemical National Bank after the insolvency of the Fidelity National Bank, were made almost altogether from negotiable paper *to which the Fidelity National Bank had no title;* and much of the collateral still on hand is of the same character. As the cases at bar do not present, as we understand, facts of that nature, but assume that the collateral was, when pledged, owned by the insolvent bank, our argument, like the brief for appellant, will be confined to such a state of facts.

The argument under review correctly says that the decree below in the cases at bar was based upon the fourth rule; but counsel are clearly in error, it seems to us, in contending that the first rule includes the second, and the second rule includes the third, so that these three rules are to be marshaled upon one side as mutually supporting each other, and as all, with the authorities maintaining them, opposed to the fourth. Before it can be stated that one of these is the greater and includes another as the less, we must be sure that the same qualities are being measured. We must look, in other words, at the principles underlying the rules, and see how far they are identical; and must analyze them, before we marshal them for comparison.

On examining these rules, we notice one feature common to the first, third and fourth, and absent in the second, viz., that while in the second the basis for a dividend is asertained at the time the dividend is to be declared, in

each of the others it is ascertained at a prior time. This is not an accidental difference, but an essential one, going to the very ground for the existence of the rule. The basis for dividends represents the quantitative right of the creditor in the funds to be distributed; and a rule which fixes this right at the time of distribution and changes its proportion with each distribution, differs generically from one which fixes it unchangeably at some prior time. This changeable feature exists in the second rule, and is lacking in each of the others. Under the second rule a computation is made as to the balance due each creditor upon his claim at the time of distribution, crediting him with all interest theretofore accrued, and charging him with all payments theretofore made, upon the ordinary rule of partial payments; thus the ratio of the amounts received by the creditors will vary with each dividend according as their rates of interest, and their collections from sources other than the trust funds, may vary. There is no such variation under any of the other rules; in each the amount in which the creditor's claim is first allowed remains thereafter without change, the basis upon which his dividends are computed. No interest is allowed him after the period as of which the amount due him is proved until the face of all claims as they stood at that time shall have been paid; nor is his proportionate interest varied while anything is due him upon the face of his claim by credits made thereon from sources other than the general trust funds. The ratio of each creditor having a proved claim with every other continues unaltered so long as the fund is unable to pay the face of the claim as proved.

Not only do rules 1, 3 and 4 differ from rule 2 in the particulars just mentioned, but they agree with each other in the theory upon which the creditor's interest in the trust fund is determined. That theory is to ascertain the amount due him at the time at which his interest in the trust fund becomes vested. Indeed this is but another mode of stating what we have already said. For the essence of rule 2 is that the creditor has no vested interest in the trust fund, but simply a right to share in distributions made from that fund accord-

ing to the amount which may be due him at the time of distribution; while the other rules all depend upon the principle that the creditor acquires a vested interest in the trust fund by the proof of his claim, and differ only as to the date as of which this vested interest takes effect, and the terms upon which the interest shall be allowed to vest at all.

The bankruptcy rule (Rule 1), is in its origin a creature of statute. For reasons as to which it is unnecessary to inquire, the law maker declared that the creditor of a bankrupt should not have coexisting two claims upon the bankrupt's assets. Before permitting him to acquire a vested claim under the bankruptcy proceedings, they compelled him to exhaust any other claim he might have in assets which, but for such claim, would fall within the domain of those proceedings, or to release his other claim. In other words, they compelled him to exhaust or abandon one vested claim before realizing upon another. When, however, he had complied with these terms and had exhausted or abandoned his prior claim, his claim under the bankruptcy was fixed as to amount as of the date of the adjudication in bankruptcy, and could not be increased by interest thereafter accruing. By the proof and allowance of his claim he acquired a vested interest in the general assets of the bankrupt which, for the amounts so allowed, remained the basis for his dividends.

The equity rule (Rule 4), grew up independent of statute, and has been developed by courts of chancery upon considerations of equity. One of those considerations is that a trust for the benefit of all creditors, whether created by voluntary act or by the rules of courts of equity, is just what it says--a trust for all creditors. From this follows another principle, that no creditor could equitably be compelled, as a condition for participating in this trust, to give up any other vested right which he held. It had long been a rule of equity that a creditor having a lien upon two funds should not be permitted to exhaust one of them to the prejudice of another creditor having a junior lien upon the fund so exhausted; but this rule was always subject to the modification that

the court of equity would not restrain the senior creditor in such a manner as to prejudice or endanger him in the collection of his whole debt; *they will do nothing which will diminish the amount collectible by him by virtue of all the securities he may hold.* Hence finding that he is a creditor, he is to be treated as such for the amount of the debt due him, and this although he may have specific security for that debt, for any other course would take away from him a part of what he already has. When a trust comes into the hands of a court of equity, the rights of all persons interested in the trust relate back to its creation. If it be a fund to be distributed, it should be distributed at once. Delay may necessarily ensue, either because the fund is not in such form as to be capable of immediate distribution, or because the distributees have not yet been fully ascertained. But these are mere incidents of administration; and as in equity that which is to be done according to a rule already fixed is regarded as done, so the distribution, when it is made, is to be made upon the same theory that would have been adopted had the trust been immediately and completely administered. In other words, the creditors and the amounts due them are to be ascertained as of the day when the trust was declared in their favor; and in the absence of direction to the contrary in the instrument creating the trust, or rules of law out of which it develops, this day will be the same day for all creditors.

The Kellock's case rule (Rule 3) differs from the equity rule only in the fact that it considers the creditor's interest in the general fund to be distributed, as vesting not at the inception of the trust, but at some later date, generally the date of proving his claim before the trustees. Till that time he is not regarded as a beneficiary under the trust; and when, by proving his claim, he manifests his election to become a beneficiary, this does not relate back to the inception of the trust, but takes effect only from the time of manifestation. It is true that this doctrine was not put forth by the judges announcing the opinions in Kellock's case (L. R., 3 Ch., 769). They rested their conclusions upon statutes and rules of court having the force of statutes, which, through the generality of the

reference, we have been unable to identify. In comparatively short time the rule promulgated in that case was changed by statute, which adopted the bankruptcy rule; so that the subject did not receive the same development in England, and examination into the logical foundations upon which the rule must rest, that it otherwise would have had. So far as England is concerned, while the rule continued there in force, it must be regarded, as stated by Judge Taft, of the Circuit Court of Appeals for the Sixth Circuit, as "judge-made" law. But study of the rule and of the principles of law upon which it must rest logically leads to the conclusion just stated, and no other. And it is expressly upon this ground that the Supreme Court of Illinois, in Levy *v.* Chicago National Bank, 158 Ill., 88; 30 L. R. A., 380, followed the rule in Kellock's case in preference to the equity rule, as declared by Judge Taft in the Fidelity Bank case. The Illinois Court says:

"But, under recent decisions of this Court, construing the assignment act of this State, it cannot be said that each creditor acquires a fixed, equitable ownership in the assigned estate at the time of the assignment." Then, after referring to sundry decisions and statutory provisions, they continue: "This being so, each creditor does not have a fixed ownership in the assigned estate at the date of the assignment; and the reason for fixing upon the amount of the claim held by him at that date as the basis for distribution of dividends is without force in this State, however it may be elsewhere. The provisions of the assignment act would seem to lead to the conclusion that the revocable interest of each creditor in the assigned estate only vests in him when he signifies his assent to the assignment by filing his claim with the assignee."

"As his interest in the estate cannot be said to accrue until he does so file his claim, it is the amount of his claim at that date which should be taken as the basis of representation in future dividends irrespective of collections from collateral securities after that date."

So far, therefore, from being true, as stated in brief for appellant (p. 11) that as to the argument of this case "the authorities divide themselves into those that favor the fourth rule and those that oppose it," they divide themselves into those that favor the second rule and those that oppose it. Every case which decides in favor of either the

first, the third or the fourth rule rests upon grounds which are radically inconsistent with the second rule. Under the second rule, the creditor has no vested ownership at all, but simply an interest varying in amount and to be computed afresh every time a dividend is made. Under each of the other rules he has an ownership which is vested long before dividends are paid, and which remains unchanged from the time it becomes vested. A decision which rests upon the basis of a vested interest is manifestly irreconcilable with one which declares there is no vested interest. So, as we have stated, the authorities supporting the second rule stand by themselves. If they find support from pecular expressions in the instruments or statutes creating the trust, they may stand firmly; but if they rest upon general principles applicable to all trusts in insolvent estates, they are opposed in principle to the authorities which support any of the other three rules.

Again, as to the cases supporting the first, third and fourth rules, those that support the third and the fourth rest upon a common principle antagonistic to that contained in those supporting the first, so far these latter rest upon general principles unaffected by statute. For the latter require an election which the former say cannot equitably be demanded.

There is no fundamental difference in principle between the cases supporting the third and those supporting the fourth rule. They agree in declaring that the creditor's right to dividends is to be determined by the amount due him at the time his right to dividends becomes vested, and is not subject to subsequent change; they differ as to the time when it does become vested; but this is an accidental difference except in cases, should such be found, where the language creating the right is identical in two jurisdictions but the decisions thereon different.

We submit that the true solution of this much vexed question is found in the reasoning of the Circuit Court of Appeals in the Chemical National Bank case and also in the Remington case (121 N. Y., 328, hereafter cited), to the effect that "*the contractual relations of the debtor and his creditor remain unchanged although insolvency*

has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement."

Any other rule would result in *impairing the obligation of contracts.*

It may be conceded for argument's sake that in the enactment of a general bankruptcy law Congress may prescribe a mode of administering the assets of an insolvent in such fashion as would result in impairing the obligation of contracts. That is because the power to pass a uniform bankruptcy law is given by the Constitution, and such laws, as they then existed, and were understood did have such effect. The opinion has been further expressed, but we believe that it has never been distinctly held, that outside of a bankruptcy law Congress may enact laws that would impair the obligation of contracts upon the theory that only the States are expressly prohibited from enacting such legislation, and that there is no similar inhibition upon Congress. The answer to this is that Congress has no power except such as is in terms conferred and such as may be necessary to carry into effect the powers conferred, and certainly neither a power to impair contracts nor a necessity for doing it, in order to carry into effect any granted power, can be found in the Constitution. But it is immaterial to discuss that question. Congress has done no such thing in the National Bank legislation.

When a lender receives from the borrower the deposit of collaterals pledged as security, there is established a contractual relation between them. The borrower agrees to repay the money, and to that extent the lender becomes interested in the whole of the borrower's assets, to the extent necessary to pay the debt. He has also become specifically interested in the collateral pledged as security. Indeed, he has become the legal holder thereof and the debtor, the pledgor, has no other interest in the collateral than the trust reposed in the pledgee to account for any surplus that may remain after the payment of the debt.

When a statute prescribed that the secured creditor, in order to prove for the whole of his debt in bankruptcy,

must surrender his security, *or* first realize on it and prove only for the balance, it did to that extent impair the obligation of a contract existing between the creditor and the debtor. Conceding that it was competent for Congress to do this in the form of a bankruptcy law for the reason which has generally been assigned in support of such legislation, yet it is a statutory fact that does not exist in the case at bar, and, it is submitted, could not have been constitutionally made a part of the legislation of Congress governing the administration of insolvent national banks.

And even if Congress might have done so, yet, not having done it in terms, a construction or application of the national bank legislation that would result in the impairment of contractual rights should be carefully avoided.

We are not contending that the constitutional inhibition was aimed at judicial tribunals. That would have been *brutum fulmen*. Courts are vested with power to prevent others from impairing the obligation of contracts, and have always shown great solicitude that their own judgments should not do so.

There being no statute requiring it in this case, we submit that any judgment that interferes with contractual relations comes within the reason for the prohibition.

The bankruptcy rule converts what on its face gives the secured creditor an equal right, into a preference against him, and in effect takes away a right which he already had, which a court of equity never willingly does unless required by statute

Faulty Illustrations.

At page 12 of the brief of Messrs. Oldham and Paige it is stated: "The same is true if instead of a one thousand dollar bond, the debtor tenders one thousand dollars in money, for money can be specifically deposited as security. If the fourth rule is sound, the creditor is wise in refusing to accept it as *payment*." The fallacy of this reasoning is in assuming a case so extreme that it never arises. No debtor ever deposits money as collateral security for his own obligation. In a few rare cases it may

have been done by a *third party* as guarantor, presenting a fact and a question not involved in this record, but when a debtor "tenders" money and the creditor receives it, the Court would probably always hold it to be a payment.

Further, it is not so clear that in such case the creditor would gain an advantage by taking the money as security. If he did so, he must hold it dead; and in many cases the loss of interest upon his collateral would more than countervail the increase of dividends he would get by treating the money as security instead of payment. If the illustration applies only to money tendered before the trust for general creditors arises, then the debtor can lawfully make no such tender thereafter, and any conversion which the creditor may make of his collateral thereafter is as between himself and his debtor treated as payment; as we have stated before, this is the effect of the decree appealed from in providing that dividends shall cease when, from collateral and dividends, the claim is paid in full.

Again, on same page: "Suppose that C, in failing circumstances, borrows of A $1,000, giving him collateral security of the value of $500, and borrows of B $1,000 without security. Here A increases the assets soon to be conveyed to a trustee by $500, B increases them by $1,000. If C's trustee is able to pay 50 cents on the dollar, A will receive payment in full and B will receive only $500. If, by misfortune or otherwise, the assets had been entirely lost, by such loss A would lose $500 while B would lose $1,000. B's risk in such assets is twice as great as A's."

The fallacy of this reasoning is manifest. It assumes that all of the money borrowed both from A and from B, or the value of it in the form of property, would pass to the assignee for the benefit of creditors. Such is notoriously not the case, and the example overlooks the *contractual relations* of the parties, and the right that lenders have to demand security when they loan, and overlooks the favor with which the law always regards diligent creditors, and the desire courts have to give to them the fruits of their diligence and caution, either in promptly enforcing collections or in taking

security when the money was loaned. In other words, the example given only proves what is true both in morals and in law, that he who trusts most risks most.

Another defect in the illustration is that it overlooks that both A and B have, at the time they make their loans, the security of the promise of the debtor backed by all his assets. The argument would, by retroactive effect, deprive A of one-half of his security. It is not the agreement of the parties or the practical effect that one-half of A's claim has full special security; on the contrary, their agreement is that every dollar of his claim has half special security. The argument splits A's demand in two, a thing which the law neither does nor permits one party to do without the consent of the other.

Touching the argument at page 15 of the brief, we submit that it is all met by the elemental proposition that collaterals pledged for the security of a debt become the property of the pledgee. The legal title is vested in him. He can sue in his own name. It is true that he is a trustee for the pledgor as to any surplus that may be received or collected, over and above the debt secured. For such surplus only he must account to the pledgor, or, if the pledgor has become insolvent, to his assignee or receiver. And, while the pledgee is thus vested with the legal title to the thing pledged, he is also the legal owner of the debt due him from the pledgor, and both rights must be maintained in their fulness, else his rights have been impaired.

Moreover, if a receiver or assignee conceives collaterals pledged for the debt of an insolvent are of value greater than the amount of the debt, he can redeem them, just as the pledgor could have done, by payment of the debt, and thus become not merely subrogated, but make himself the actual owner of the collaterals, without relying on the trust duty of the pledgee to return the surplus. This right to redeem by payment meets all the needs, both legal and equitable, of the situation, without disturbing contractual relations previously established.

Another defective illustration is found at page 16 of the brief. "If A owes B $1,000 not due, and B receives $900 of A's money applicable to the payment of the $1,000, it

must be presumed that they did not intend that B should hold the $900 and still continue to draw interest upon the $1,000." We fail to see how this imagined case illustrates anything. If the $900 was a *payment before insolvency*, it would have reduced the debt to $100 and the creditor could prove for only $100. But if the $900 was deposited in the form of some collateral security, then under rule 4 B would get dividends on his $1,000 without regard to his collateral security, and, if a surplus were produced out of his collaterals, that surplus would belong to the Receiver as successor to A.

At page 19 of the brief, the learned counsel say: "Now, while it is not contended by the advocates for the collaterally secured creditor, that if any collateral is *in fact* collected *before insolvency*, it should not be deducted from his provable claim, yet no consideration has been given to the principle that equity considers that as done which ought to be done. *If it is the debtor's duty to pay when the debt is due, and the creditor's duty to apply the proceeds on his claim*, no reason is apparent why equity should not require these duties to be performed, if other general creditors will suffer from their non performance." (Italics ours.) The infirmity of this argument is quite plain.

It is an extension of the rule that equity will regard as done what ought to have been done, not heretofore familiar to the bench and bar. Because the debtor ought to have paid, but did not, and because the collaterals ought to have been paid, but were not, then equity will consider that done which ought to have been done, although not done. Only a little extension of the reasoning would cut the creditor out entirely. Thus: *The creditor ought to have been paid before the debtor became insolvent, therefore the creditor has no claim at all when insolvency supervenes; upon the ground that equity considered that as done which ought to have been done.*

By giving the secured creditor all the rights of security he has in both funds, general creditors have not suffered by the non-performance of the debtor, or non-performance of the obligors in the pledged collaterals. They may suffer in the sense of having trusted the wrong person, and they

may ultimately suffer in the sense of not being fully paid, thus suffering by their own act in not obtaining security; but they suffer no legal wrong, nor do they suffer any moral wrong. They have acted with their eyes open. They suffer no inequality or inequity. They only suffer the results of loaning money or giving credit without adequate security, while another creditor is saved that suffering by having taken security. The secured creditor has done no legal or moral wrong to those who trusted indiscretely or blindly.

The true application of the rule would be that equity regards the trust fund as distributed upon the day the trust fund was created, because that is the thing which ought to have been done and would have been done if the fund were then in condition for division, and if the shares of its participants had been duly ascertained. The delays of the law in converting the assets into distributable form, and ascertaining the participants and their respective proportions, should not work so as to change their rights.

The decisions of this Court upon the National Banking Act, require the affirmance of the decree appealed from as a necessary corollary

The sections of the National Banking Act to be considered are U. S. Revised Statutes, Secs. 5234, 5235, 5236, 5242, and Sec. 1 of the Act of June 30, 1876, 19 Stat. at Large, 63, supplement to R. S., First Edition, p. 216, and Second Edition, p. 107.

Sec. 5234 and the supplementary act of 1876, authorize the Comptroller of the Currency to appoint a receiver to close up the affairs of a national banking association when it has refused to redeem its circulating notes when presented for payment; or has been dissolved and its charter forfeited; or has allowed a judgment against it to remain unpaid for thirty days; or whenever the Comptroller shall have become satisfied of its insolvency, after examining its affairs. Such Receiver is to take possession of its books and effects, liquidate its assets, and pay the money so made to the Treasurer of the United States.

Sec. 5235 requires the Comptroller, after appointing such Receiver, to give notice by newspaper advertisement, for

three consecutive months, "calling on all persons who may have claims against such association to present the same, and to make legal proof thereof."

Sec. 5242 makes transfers of its property by a national banking association after the commission of an act of insolvency, or in contemplation thereof, to prevent distribution of its assets in the manner provided by Chapter 4, Title LXII. Rev. Stat., or with a view to preferring any creditor, except in payment of its circulating notes, null and void.

Sec. 5236 reads as follows:

"From time to time, after full provision has first been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the share-holders of such association, or their legal representatives, in proportion to the stock by them respectively held."

It has been settled that these provisions create a trust in favor of creditors of an insolvent bank, and that this trust has its inception not in the appointment of the Receiver, but in the commission of the act of insolvency which led to that appointment. By that act the lien of the creditors upon the assets of the bank, as they then stood, is fixed. All rights, legal or equitable, which then existed, other than those created by preference forbidden by Sec. 5242, are preserved; and no additional right can thereafter be created either by voluntary or involuntary proceeding.

National Bank *v.* Colby, 21 Wall., 609.
Scott *v.* Armstrong, 146 U. S., 499.

In administering this trust the holders of the circulating notes clearly have a first lien; their notes must first be paid in full, and the balance only is available for disposition among other creditors. And this distribution must be

" ratable " on the claims as proved or adjudicated, that is upon one rule or proportion applicable to all alike; and the rule is to be applied to the *claim*, not to the amount due upon it at the time of distribution.

As the rule must be uniform in its application to all claims, it must regard all claims with reference to the same date or point of time. The dividend could not be ratable, that is in the same ratio or proportion, unless the same basis is adopted for all claims, that is, unless they are all estimated as of the same point of time. In discussing the subject with regard to the scope of the decisions generally, and not as affected by the special provisions of the National Banking Act, we have already pointed out uniformity cannot result if the time of the filing or acceptance or adjudication of the proof of claim be selected, as this time may not be the same for any two claims, and puts it in the power either of the creditor to secure a special advantage, or of the liquidator to force a special disadvantage by accelerating or postponing the time of action, as circumstances may dictate.

And in the previous discussion we have pointed out that the partial payment rule is a rule for dividends *upon the amounts due* upon the claims at the time of distribution, and not for equal dividends upon the claims themselves; and we have pointed out its inconvenience.

It follows that the date as of which the claims are to be ascertained is and must be that as of which their rights *inter sese* arise the date of the declaration of the insolvency of the bank. And so this Court has adjudged in White *v.* Knox, 111 U. S., 784.

In that case it appeared that the Miners' National Bank had been put into the hands of a receiver by the Comptroller of the Currency about December 20, 1875. White presented a claim for about $60,000, which the Comptroller refused to allow. White thereupon brought suit to have his claim adjudicated, and on June 23, 1883, recovered judgment for $104,523.72, being the amount of his claim, with interest to the date of the judgment. In the interim the Comptroller had paid other creditors ratable dividends, aggregating sixty-five per cent. on the amounts due them respectively *as of the date when the*

bank failed. When White's claim was adjudicated, the Comptroller calculated the amount due him according to the judgment *as of the date of the failure*, and paid him sixty-five per cent. on that amount. White, admitting that he had received all that was due him on the basis of distribution assumed by the Comptroller, claimed that he was entitled to have his dividends calculated on the face of his judgment, which would give him $21,379.66 more than he had received, and applied for a mandamus to compel the payment to him of that sum. The writ was refused in the Court below, and its judgment was affirmed. We quote from the opinion of Mr. Chief Justice Waite, as follows (italics ours):

Page 786: "Dividends are to be paid to all creditors ratably, that is to say, proportionally. To be proportionate they must be made by some uniform rule. They are to be paid on all claims against the bank previously proved and adjudicated. All creditors are to be treated alike. The claim against the bank, therefore, must necessarily be made the basis or the apportionment."

Page 787: "The business of the bank must stop when insolvency is declared (Rev. Stat., Sec. 5228). No new debt can be made after that. The only claims the Comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him, or by the adjudication of a competent court, to have had their origin in something done before the insolvency. It is clearly his duty, therefore, in paying dividends, *to take the value of the claim* AT THAT TIME *as the basis of distribution.*"

It is not without interest to note that the very argument we are now urging—that the date fixed for the computation of interest shows the date at which the creditor's interest in the assets vests—has been applied conversely by the Supreme Court of Pennsylvania in Jamison's Estate, Boyer's Appeal, 163 Pa., 143. It appeared in that case, as in White's case, that a claim had been put into judgment after the assignment, and this judgment, as usual, included interest and costs up to its date. In allowing the claim, however, against the insolvent estate, the auditor, as did the Comptroller in White's case, allowed interest only to the date of the assignment. This was ap-

proved by the Supreme Court, who said that such a rule followed necessarily from the doctrine that creditors became equitable owners of the insolvent estate in the proportions of their debts at the time of the assignment, referring to sundry cases, and added:

"As on the one hand subsequent partial payment through means of outside collaterals does not diminish a creditor's proportionate share of the assets assigned, so on the other an elargement of his claim by judgment including interest or penalties cannot increase such share."

It being settled by National Bank *v.* Colby, 21 Wall., 609, and Scott *v.* Armstrong, 146 U. S., 499, that the creditor's share of the bank's assets, and by White *v.* Knox, 111 U. S., 784, that his basis for dividends cannot be increased by any right arising after the declaration of the bank's insolvency, parity of reasoning requires that he be not affected to his detriment by any such subsequent right. If a new right cannot work to his advantage, neither can it to his injury.

It has never been contended that the giving of collateral without more operates of itself as a payment or satisfaction either of the debt or of any part of it. The debtor who has given collateral security remains a debtor, notwithstanding, to the full amount of the debt; and, as was said in Lewis, Trustee, *v.* United States, 92 U. S., 623, "it is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor."

The amount due upon the claim when the insolvency of the bank is declared is not affected by the fact that the claim was secured. And as the basis upon which the creditor is to draw dividends is the amount of his claim at that time, it follows necessarily that, for the purpose of fixing that basis, it matters not what collateral he may have. He cannot be charged with the estimated value of the collateral at that time, and limited to proving for the residue only; for that would be not only compelling him to exhaust his collateral before enforcing his direct remedies against his debtor, but *selling* the collateral to him. He had entered into no contract to buy it; and, in the

absence of such contract, he cannot be made an unwilling purchaser. Moreover, the bank, when its insolvency is declared, has no power to make such a sale; nor can the Receiver, when appointed, make it *nunc pro tunc;* for he has such power only as the statute gives him, and this is not among them. The secured creditor is a creditor for the whole amount due him when the insolvency is declared, just as much as the unsecured creditor, and cannot be subjected to a different rule. The statute furnishes a complete code for the distribution of the effects of an insolvent national bank, and its provisions cannot be departed from (Cook County National Bank *v.* United States, 107 U. S., 445, 448).

It is urged by our opponents that the case just cited itself in some mysterious and recondite way has adjudged the question arising in the case at bar in accordance with his contention. They practically admit that the question was not raised or debated in that case by counsel nor discussed by the Court, and yet they seem to think the decision of the Court has passed upon it. It should be sufficient on that question to quote the terse statement of Mr. Justice Miller, speaking for this Court in Woodruff *v.* Parham (9 Wallace, 123, 138), where he said:

"We take it to be a sound principle, that no proposition of law can be said to be overruled by the Court which was not in the mind of the Court when the decision was made."

No person can give attentive reading to the Cook County Bank case without seeing that the question we have been here debating was not considered as involved. The bill there was filed by the United States and treated as one not to ascertain the rights of the United States, but to enforce a single right as claimed, viz., the right to a preference not merely for circulating notes, but for other indebtedness, or failing this, to apply the security given for circulating notes to the discharge of other indebtedness. The existence of this rights in both aspects having been denied, the Court did not proceed to find, or make provision for finding, what other rights the United States might have, but dismissed the bill absolutely. The

pleading was apparently anomalous; but the Court treated it as construed by the argument; and finding the plaintiff had not the rights claimed, sustained the demurrer and dismissed the bill. The remarks of Mr. Justice Field on page 449, which are quoted on page 46 of our opponent's brief, are evidently directed in the first instance to the action of the Government before the bank fails; in other words, the Court says that with the one exception as to circulating notes the Government deals with the national bank just as any other creditor does; if it takes security and this security is insufficient, it is in no better position than any other creditor having insufficient security. We submit that the cause must indeed be weak which finds it necessary to contort this decision into a declaration that a secured creditor must buy his collateral or exhaust it and prove for the deficiency.

We have thus endeavored to show that in every question which has heretofore arisen as to the relative rights of creditors of an insolvent bank under the National Banking Act, these rights have been determined by this Court as they stood at the time of the declaration of insolvency. We contend that the same rule applies here; that the claim which is to be proved or adjudged is the claim as it stands at the declaration of insolvency; and that it is not to be modified by anything that takes place thereafter. When the insolvency was declared each creditor had a claim in a given amount against the insolvent bank; for this claim the creditor may prove, and on it he may receive, dividends whether he has security or not. The fact of his having security and of his making collections thereupon is one of utter indifference, with the exception that when he has received payment in full, his rights to dividends and his right to retain his securities ceases.

Having expressed our views as to the concordances and differences in these various rules and the principles upon which they rest, we shall next consider the authorities from which the rules have been deduced, and especially those cited in support of the first, second and third rules respectively. It is deemed needless to consider the authorities cited on page 16 of the brief to the effect that a collection made from collateral is to be applied to

the debt thereby secured. Granting the principle, yet the solution of the question here involved is not advanced. It is conceded that when the debt has been paid in full, whether from collaterals or dividends, or both together, the right to receive dividends ceases. The dispute is as to the date when the amount due upon the claim is to be ascertained for the purposes of dividends. If that amount is to be ascertained as of the date when the creditor's interest in the fund becomes vested, as maintained by the first, third and fourth rules, then it matters not from what source credits may subsequently arise to be applied as a payment upon the debt so long as any portion of the debt remains unpaid. It is only in case the second rule is adopted, by which the amount of dividends is to be ascertained as each dividend is declared, that it becomes material to inquire whether money collected from collateral is a payment or is itself but collateral, as being the proceeds of collateral.

Nor is it necessary for us to refer to the authorities cited on page 13 to the proposition that a liability contingent when the trust begins may be proved if the contingency happens before the time for distribution, further than to say that we do not understand this principle to be "well established," but, on the contrary, to be much debated and dependent in its application upon the language of the statute or instrument creating the trust which may confine its benefits to debts accrued or accruing; or by use of general phrases, such as the word "liability," may embrace not merely debts but claims which are contingent and matters which, though neither actual nor contingent debts, yet will, in the ordinary course of events, become such, *e. g.*, the liability of the tenant for future rents.

Cases supporting the equity rule.

On page 40 of the brief it is, in effect, stated that the only cases to be found in which the equity rule was applied to the extent of allowing a creditor "to draw dividends on the full amount of his claim as it existed at the time of insolvency, regardless of payments since received from collaterals before or after time of proof," are those

decided by the Supreme Court of Pennsylvania, and that aside from the Pennsylvania cases and Allen *v.* Danielson, 15 R. I., 481 (which counsel for appellant contend does not support that proposition), neither Court nor counsel in the Fidelity Bank case were able to find authority for the proposition.

They do not mention the cases which were relied upon by Court and counsel in the Fidelity Bank case, and apparently have not examined them; or such an assertion would not have been made.

We have already called attention to West *v.* Bank of Rutland, 19 Vt., 403, which was one of the cases relied upon by both Court and counsel in the Fidelity Bank case; and we may add that the passage which we hereafter call attention to as omitted in the quotation from that case on page 30 of the brief, under review, was quoted in the printed brief of counsel for the Chemical Bank in the Fidelity Bank case.

Court and counsel in that case also referred to People *v.* Remington, 121 N. Y., 328. The statement of facts there shows that the Receivers objected to the claim not only because the creditor had not applied uncollected collateral, but because he had not deducted sums already realized from the collateral. The opinion of the Court, on page 332, states that the question for consideration is whether the claim should be reduced by a deduction from its amount "of the value of the collateral securities, *or of any proceeds thereof*" (italics mine). In the discussion that followed the Court made no distinction between collaterals realized and those still in *statu quo*, evidently because they saw none, or they had stated it as one of the questions for decision whether such distinction could be made. They affirmed the right of a creditor to prove his claim in the sum due him at the time the trust was declared. In the Court below, however, whose decision was affirmed, the question as to whether any real distinction existed between collections from collateral and collateral unrealized was discussed and decided in the negative. In that case the question at bar was fairly and fully presented, argued by eminent counsel, fully discussed by the

Court, all authorities pertinent to the question were considered, and the rule we now contend for was fully and explicitly adopted. The substance of the decision is correctly stated in the syllabus: "The creditors were entitled to prove their claims against the estate without regard to any collaterals they may hold, and to receive dividends for the amounts proved." The passages here referred to were quoted and commented upon in the printed brief filed by counsel for the Chemical National Bank in the Circuit Court of Appeals.

See also to the same effect, Matter of Ives, 25th Abbot's New Cases, 63; and 54 Hun, 505, 510.

In Morton *v.* Caldwell, 3 Strobh. Ch., 162, another decision relied upon by Court and counsel in the Fidelity Bank case, it appeared that collections had been made from collateral after the insolvency was declared, but before the claim was offered for proof. Chancellor Johnson, in what Judge Taft in the Fidelity Bank called "a most convincing opinion," held that this made no difference, but that the claim was to be taken as it stood at the time the insolvency was declared. Having shown the difference in the amount the defendant would have received if he had presented his claim before collecting on the collateral, and what he would receive under plaintiff's contention, the Chancellor continues (italics his), p. 165:

"Can a rule attended with such consequences, and founded upon no better grounds than the mere contingency of the collateral payments being made *before* or *after* the presentation, be the rule of law? Can that be the rule which puts it in the power of any third party who chances to be surety for a debt, by a partial payment, however capriciously or collusively made, to reduce the amount recoverable from the estate of his deceased principal, to the disappointment and loss of the fair creditor?"

After a most thorough consideration of the subject, and reversing a prior decision of his own in the same case, the Chancellor held, that equity required that the claims of all creditors must be settled as of one and the same date, regardless of what might happen thereafter, and that the

only date which could reasonably be chosen was that when the trust began.

As to Allen *v.* Danielson, 15 R. I., 480, it is true there is no specific statement in the opinion that the collections upon the collateral were before the claim was presented to the assignee for creditors. But the facts, as stated, lead almost inevitably to that conclusion. The Court say:

"It appears in the case at bar that the assignee has already made two dividends. No part of the first was paid to the secured creditors when it was made, it being then supposed that the mortgaged property would suffice to pay them in full. Before the second dividend the mortgaged property was sold and the proceeds were found to be insufficient, quite a large residue of indebtedness remaining unpaid." The assignee then paid the secured creditors and made up to them the first dividend, based, however, upon the deficiency only. "The assignee now has more assets to be applied; and the creditors who were secured contend that they are entitled to be paid out of said assets so much as is necessary to put them on an equality with the other creditors, on the basis of their claims in full, before any third dividend is made."

After discussing some of the authorities, the Court conclude:

"Our decision is that the creditors who were secured are entitled to receive out of the funds in the hands of the assignee so much as will put them on a par proportionally with the other creditors, on the basis of their claims as they were when the assignment was made, before any other dividend – provided that what they receive shall not exceed what remains due to them as creditors—if the assignee has so much."

It is reasonably clear, we submit, that the secured creditors did not present their claim until liquidation of their security showed that it was insufficient.

We have said enough to demonstrate the inaccuracy of the claim of counsel for appellant that the rule for which we contend, when applied to collections after insolvency but before proof, has received support only in the State of Pennsylvania. But were this true it would not weaken the argument, or lessen the confidence with which we urged it. The fundamental case in Pennsyl-

vania, as stated by counsel for appellant is Miller's Appeal, 35 Pa. St., 481, decided by Mr. Justice Strong, afterwards of this Court. It is placed upon a principle which makes all cases approving the same principle authority for rule 4, as phrased by counsel for appellant (B., p. 10), whether in those other cases collateral had been realized before proof or not. That principle is that the creditor's interest in the assets vests at the time the trust is declared; proof of his claim afterwards is simply a matter of administrative detail; when proved, the claim relates back to the origin of the trust in all its attributes; and that the claim at the time is the amount that is owing by the insolvent, and which could be collected from him by suit and execution were he solvent. Collaterals are but collateral; the debt stands in its full amount, and they are but security. Hence collaterals existing at the date of the insolvency cannot be deducted, as they could not be were the insolvent solvent. And as the claim is to be taken as of the declaration of the trust, it matters not what collections have been made upon collaterals since that date.

Every case which rejects the bankruptcy rule, and declares that the claim of the creditor against the insolvent estate is the same claim which he would have if the insolvent were solvent; and that the nature of the trust is such as to give him a vested interest, a *quasi* ownership in the trust assets as of same date, necessarily holds that collections from collateral after that date are immaterial. And every case which rejects both the partial payment rule and the bankruptcy rule, and holds that the amount to be proved is not affected by the collaterals for the claim, must, of necessity, hold that the trust creates a vested interest or ownership in the participating creditors. Holding this logically, they must hold farther that the extent and nature of this interest is not affected by collections made from collaterals after the interest vests. So, as stated before in substance, all cases which apply the equity rule, generally including those which apply the rule in Kellock's case, are authorities for the position that collections from collateral, after the creditor's interest in the trust estate vests, are immaterial; they are all opposed to the bankruptcy rule and the partial payment rule;

they differ among themselves, where they do differ, only as to the date when the creditor's interest vests in law.

In considering whether the weight of authority is with or against the partial payment rule or the bankruptcy rule, it is therefore proper to group together all cases which support the equity rule, meaning thereby the rule that a creditor may prove his claim without regard to the collaterals he holds. For they all are radically opposed to the cases which support the partial payment rule, which rest upon the theory that the creditor has no interest by way of ownership in the trust assets, and to the cases supporting the bankruptcy rule, which rests upon the theory that the creditor's interest in the trust assets is not determined by the face of his claim, but by the amount owing him when his collaterals are exhausted or surrendered; and rest upon the contrary principle that the trust has vested an ownership in the creditor in the trust assets, determined by the amount that is owing to him. They differ only as to when this ownership begins. And all those which assert that it begins as of the date of the origin of the trust, and not the mere proof of the claim, support the contention that moneys realized from collaterals, after the origin of the trust, are not to be deducted in ascertaining the amount to be proved, although the facts of the case before the Court may have called for no expression upon that point.

We shall, therefore, group together the remaining cases we desire to cite, sustaining generally the proposition that the creditor's claim is to be taken as it stood at the date of the origin of the trust, without attempting to distinguish those in which collections were made thereafter, but before proof, and those in which the collections were made only after the proof, or in which no collections at all were made. For, for the reasons stated, such a distinction would be a distinction merely, and not a difference.

First, we give the cases that were cited in the opinion of the Circuit Court of Appeals, omitting those we have above mentioned.

Moses *v.* Ranlet, 2 N. H., 488.
Re Bates, 118 Ill., 524.
Findlay *v.* Hosmer, 2 Conn., 350.

Logan *v.* Anderson, 18 B. Mon., 114.
Citizens' Bank of Paris *v.* Patterson, 78 Ky., 291.
Brown *v.* Merchants & Farmers' Nat. Bk., 79 N. C., 244.
Kellogg *v.* Miller, 22 Oregon, 406.
Miller's Estate, 82 Pa., 113.
Graeff's Appeal, 79 Pa., 146.
Patten's Appeal, 45 Pa., 151.
Third Nat. Bk. of Detroit *v.* Haug, 82 Mich., 607.
West *v.* Bank of Rutland, 19 Vt., 403.
Citizens' Bk. *v.* Kendrick, Pettus & Co., 92 Tenn., 437.

And to them we add the following, some of which were cited by counsel to the Circuit Court of Appeals, but not mentioned in their opinion, and others have been published since their opinion was announced.

Greene, Receiver, *v.* Jackson Bk., 18 R. I., 779.
Brough's Estate, 71 Pa., 460.
Jamison's Estate; Boyer's Appeal, 163 Pa., 143.
Winston *v.* Biggs, 117 N. C., 206.
In re Meyer, 78 Wis., 615.

The common principle underlying all of these cases is that a secured creditor, prior to the assignment, is a general creditor as well, that is to say, has a personal claim against his debtor which he can pursue by judgment and execution against all of the assets of his debtor; that the creation of a trust for creditors is for his benefit as well as for all other creditors; that the proportionate interest of each creditor in that trust is determined by the amount due him when the trust is created; and being then vested cannot be reduced by subsequent events. This theory of the nature of the creditor's interest in the trust fund has received application in Pennsylvania, Connecticut and Ohio from another point of view. Those States require the owner of personal property to return it for taxation.

But in each the Supreme Court has held that an assignee for creditors is not the owner of the assigned property within the meaning of the tax law; that he has but the legal title, the equitable interest being in the creditors.

School Directors *v.* Rathvon, 30 Pa. St., 533.
Brooks *v.* Town of Hartford, 51 Conn., 112.
McNeill *v.* Haggerty, 51 Ohio St., 255.

The Connecticut case presented the question as to the assets in the hands of a receiver of a dissolved insolvent corporation. On page 125, the Court having referred to the decree dissolving the corporation, said:

"Since the passing of that decree the creditors have been and now are the beneficiary owners of all of its property. Within the meaning of the statute just cited (referring to the Tax Act) the property *belongs* to them. That it was not paid over to them at once was because they were not known, and because the amount of their claim was not ascertained, and because the property of the corporation was then widely scattered and not in a form in which payment could be made. But their rights, when determined, will be determined as of the date of that decree. When their claims are paid they will be paid as of that date, *nunc pro tunc*."

The Ohio case was one of an assignment for the benefit of creditors. On page 263 the Court say:

"The effect of the assignment is to devote the property absolutely to the satisfaction of the debts of the assignor, just as they existed at the time of the assignment, subject, necessarily to be depleted by the existence of the trust."

And again on page 267 the Court say:

"While the legal title to the property is in the assignee it is so only for the purpose of facilitating the settlement of the trust. Equitably, the property is vested in the creditors."

Counsel for appellant suggest that though the doctrine for which we contend has been repeatedly asserted by the Courts of Pennsylvania, yet "they have thrice failed to enforce the rigor of its logic." And they

refer to Sweatman's Appeal, 150 Pa., 369; Assigned Estate of Wilhelm, 182 Pa. St., 281, and *In re* Wetzler's Estate, 3 Pa. Supr. Ct., 435). Examination of these cases show they do not justify the comment; in Sweatman's Appeal the Court held in substance that the assignment for creditors was itself a breach of the contract for a lease previously existing. The right of action in favor of the creditor having been created by the assignment, it was not open to the assignee, or any who claimed under him, to say that it was not in existence when the assignment took effect. The very act which brought the assignment into existence gave birth also to the right of action. They were concurrently in existence from the moment the assignment began. The right of action, therefore, was not subsequent to the assignment, and not being subsequent it could not be deprived of its benefits.

Wilhelm's Estate, 182 Pa., 281, is in no way inconsistent with the other Pennsylvania cases, or with the decisions of the Circuit Court of Appeals.

All that the Court decided was that collections from collateral after the date of the assignment must be applied to interest accruing after that date. This is exactly what was adjudged by the Circuit Courts of Appeal when they declared that the payments to the creditor from dividends should cease when, by such payments and his collections from collateral, he had received payment in full.

In re Wetzler's Estate, 3 Pa. Sup. Ct., 435, did not present a question under a trust for creditors at all, but simply one of marshaling as between specific lienholders. Lemon and Ramsey each held judgments against Wetzler equal in lien upon his real estate. Ramsey issued execution upon his judgment which was levied December 1, 1892, on Wetzler's personalty. Wetzler afterwards assigned for creditors, and the personal property levied on was, by agreement, sold by the assignee, but its proceeds to be applied upon the execution. These two judgment creditors being the only claimants, and the assets being insufficient to pay them both, the Court held that the proceeds of the personalty should be credited as a payment, and distribution made *pro rata* after such credit of the balance which arose from the real estate. All the rights

worked out had accrued prior to the assignment, and neither party was endeavoring to enforce a lien obtained by virtue of the assignment.

Authorities cited as to partial payment rule.

These are found on pp. 28–29 of appellant's brief, the statement of their contents continuing to page 37.

The first case in this list is West *v.* Bank of Rutland, 19 Vt., 403–410. This is an unfortunate choice as a leader, since the case does not support the Maryland rule, but, upon the contrary, the equitable rule. And there is an accidental and unintentional oversight in the quotation made from that case on page 30 of the brief, equally unfortunate, because two sentences are omitted, one from the body of the passage quoted — without indication of the omission — and another immediately following that passage, which make manifest what we say. As Judge Redfield's opinion in this case is commonly considered a leading one upon the subject in this country, we shall treat the case with more fullness than we shall consider necessary as to the others.

The facts in brief are as follows:

Lovell and others had become surety with the Bank of Rutland for the Village Falls Manufacturing Co., and Fullerton was guarantor as to the sureties. Fullerton received from the Village Falls Co. "a large amount of funds — but not sufficient to pay his liability," as collateral security. Lovell died insolvent. Fullerton deposited with the bank an amount sufficient to pay the debt, so as to make it secure; but this was not applied in payment, because it was desired that proof of claim be made against Lovell's estate by the bank, instead of Fullerton, which was done for its full amount. Thereupon another creditor brought this suit, alleging that the proof was made in the name of the bank for the use of Fullerton, and asking that an account be taken of the collaterals received by Fullerton, and the collections thereon, and the proof of claim revised by crediting such collaterals or collections. Fullerton admitted having realized $5,160.98 on the collateral.

The Court below had dismissed the bill, and on appeal this decree was affirmed, the Court deciding that it had power to revise the allowance of the claim, that it must be treated as if proved in the name of Fullerton, but that notwithstanding that Fullerton had collateral, and that part of this collateral had been converted into money, yet Fullerton might still prove and take a dividend upon his whole debt, unaffected by such collection.

While the report does not state specifically whether the collections were made by Fullerton before or after the proof of claim, yet it seems apparent from the course of the discussion that they were made before.

Turning now to the passage which is partly quoted on page 30 of the brief, the oversight, as we have said, destroying its real meaning, we give the passage as it is found in the report, italicizing the omitted matter:

"It is true, that if the security has been converted into money, and it is between debtor and creditor, it ceases to be collateral and operates directly as payment, so that the debt is thereby reduced and the creditor can only go for the balance. *And if the fund, which is collateral, is such, that the dividend will more than make up the deficiency, then, upon the payment of the whole debt, the creditor must assign.* This was the only remedy at the civil law. In England and in this country, in such case, the Court of Chancery will often times compel the party to apply the funds in his hands and only proceed against the other funds for the balance, and, if the funds are not money, will require them to be reduced to money. *But in no case, where the security is merely collateral, will a court of equity compel its application, merely for the purpose of reducing a dividend, unless the debtor stands in the relation of a co surety.*

This case is not in principle to be distinguished from that of a mortgage security merely, which the party may hold, and still take a dividend upon his whole debt."

It appears clearly enough from this passage, and this impression is confirmed by the residue of the opinion, that when Judge Redfield says money realized from security ceases to be collateral, and operates as payment so that the debt is thereby reduced and the creditor can go only for the balance, he is referring to the transaction merely as it stands between debtor and creditor, as he himself

says in the same sentence. If his meaning were otherwise doubtful, it is shown to a demonstration by the next sentence (the first omitted passage we have italicized); for if in a trust for creditors one was allowed to prove and receive dividends only upon the balance due him after applying collections from his collateral, it is impossible that a dividend apportioned *pro rata* upon this balance should pay the balance, and yet the estate be insolvent. A *pro rata* dividend could not *more than* make up the deficiency if it were calculated upon the deficiency. This first italicized sentence is also necessary to make clear the thought in Judge Redfield's mind when speaking of the civil law remedy. He did not mean, as one would suppose from reading page 30 of our opponent's brief, that applying collections as payment and going for the balance was the only remedy at the civil law, but that paying up the debt and taking an assignment of collateral was that only remedy. The instances to which he alludes, where a court of chancery will compel the exhaustion of funds in the creditor's hands before permitting him to proceed against the debtor's estate are probably those exceptional cases where the funds held by the creditor are in fact the *res rea*, the thing in default, and the debtor's obligation is merely secondary in the nature of a guaranty of sufficiency, not of payment; such as the case of a factor who makes advances on the credit of goods consigned (Balderston *v.* National Rubber Co., 18 R. I., 338; Matter of Atwood & Sons, 3d App. Div., [N. Y.,] 578.) Certainly they are not cases where the debtor has entered into a personal obligation of payment, and furnished security that he will fulfill it, for in the next breath he states that in no such case will equity compel the prior application of collateral. And in 3d Appellate Division the Court distinguishes the case from People *v.* Remington, above cited, by pointing out that in the Remington case there was a debt for which collateral had been pledged, while in the case before the Court the debt "only comes into existence after the sale of the (consigned) property, and then the debt is for the deficiency, and that alone can be proved" (p. 581).

In re Estate of McCune, 76 Mo., 200; Erle *v.* Lane, 22

Colo., 273, and Third National Bank *v.* Lanahan, 66 Md., 461, the statutory requirement was that the distribution should be made "according to the respective amounts" due the creditors. This was held to mean the amounts due at the time of distribution. Thus the Missouri Court says (p. 206):

"Now, the 'amount' of a demand, it is almost superfluous to say, embrace the interest as well as the principal of such demand. Both principal and interest constitute, in the aggregate, the amount or sum total of that demand."

And adds that payments are to be credited as in any case of partial payments.

In the Maryland case the Court said (p. 468):

"The obligation of the trustee to pay does not depend upon the state of the account between the creditor and the assignor at the time of the assignment, but at the time when payment is made."

And in the Colorado case the Court expressly distinguished the decision in the Chemical Bank case and others of that nature, after quoting from them sufficient to show they rest on the theory that the creditor has acquired a vested interest in the assets by saying (p. 277) that the quotation:

"Shows their irrelevancy to the case at bar, since the creditor of the estate of a deceased person has no ownership or vested interest in its assets."

Then they quote the State of Colorado, which provides in terms for a retabulation of the debts of every dividend In this connection, we may refer to Jamison *v.* Adler-Goldman Com. Co., 59 Ark., 548, a case overlooked by our opponent, which takes this same distinction as to lack of vested interest under the provisions of the statute of Arkansas, and for that reason distinguishes, while approving, the cases upholding the equity rule.

The cases of Lowell *v.* French, 54 Vt., 193, and Bank *v.* Alexander, 85 N. C., 352, presented the question whether collections from the estate of an insolvent principal should be credited to reduce the claim against the estate

of an insolvent surety. The Courts held that they should, the North Carolina Court distinguishing the case by the fact of suretyship. In the Vermont case the claims had already been proved against the surety before the payment was received from the principal; but in the North Carolina case the collection had been before proof. The North Carolina case, therefore, should not be grouped among the cases supporting the partial payment rule, but those supporting the Kellock's case rule.

Page 31 of the brief refers to Blumenstiel on Bankruptcy, page 287 *ex parte* Harris, 16 N. B. R., 432 (11 Fed. cases, 606, No. 6109), and *in re* Babcock, 3 Story, 393 (2 Fed. cases, 289, No. 696), as supporting the same contention in administration under the bankruptcy acts. The authorities cited by Blumenstiel at the place mentioned are English, and depend upon the provisions of the English bankruptcy acts. It would carry us too far afield to investigate those. The American cases referred to do not support the contention. Judge Story's opinion in *in re* Babcock is to the contrary; and Judge Lowell's in *ex parte* Harris, was a factor's case like the decision in Rhode Island and New York above referred to.

The feature mentioned that the collection received was from the principal and the dividend to be made was from the surety might of itself, be sufficient reason why we need not concern ourselves with these cases in discussing another where such relations did not exist. But before dismissing them from consideration, we desire to add that even where such relations exist the contrary rule is supported by the weight of authority. Even the Courts of Massachusetts, which have held most faithfully to the bankruptcy rule, have recently refused to apply it in such a case as this; see Roger Williams Nat. Bank *v.* Hall, 160 Mass., 171, where Holmes, *J.*, in a case where it was sought to prove against both maker and endorser of a note, said:

"In view of the modern decisions and the general agreement of opinion, we think it unnecessary to argue elaborately for the right of a creditor who has acquired two contracts binding two distinct estates to insist upon both."

The weight of Philadelphia Warehouse Co. *v.* Anniston Pipe Works, 106 Ala., 357, is materially reduced by the fact that the Court regards the case in 66 Md., 461, as identical in principal with their own decision in Gusdorf & Co. *v.* Ikelheimer & Co., 75 Ala., 153, overlooking the fact that in the latter case there was no trust for general creditors, but a contest between specific lienholders, and the holder of the prior lien had security sufficient to satisfy his claim whichever way the securities were marshaled.

The case of Whittaker *v.* Amwell Nat. Bk., 52 N. J. Eq., 400, should not be classified among the cases supporting the partial payment rule, but among those supporting the bankruptcy rule—it falls there in effect; for while the Judge permits proof before exhausting collaterals, he denies a dividend until that is done.

Thibaudeau *v.* Benning, 20 Canada Sup. Ct., 110, presented questions under, and was decided upon, peculiarities of the provincial law or customs of Quebec. One curious upon the subject should examine not only the report on appeal, cited as above by our opponent, but those in the lower courts (Montreal Law Reports, 2 Superior Ct., 338, and 5 Q. B., 425). Because the case depended upon Quebec law, the Supreme Court of Canada, in Cooper *v.* Molson's Bank, 26 Canada Sup. Ct., 611 (also cited by our opponent's brief, p. 16), when discussing a case of partial payments as between debtor and creditor, and not in an assignment, said it presented questions identical in principle with those in the Thibaudeau case, but was not governed thereby, because that was decided upon the law of Quebec.

In Wheeler *v.* Walton & Whann Co., 72 Fed., 966, Judge Wales did not adopt the partial payment rule, but the Kellock's case rule. As this was all which the creditor in that case contended for, the dispute being only whether that rule or the bankruptcy rule should apply, obviously the decision is no authority for the partial payment rule.

In London & San. F. Bk. *v.* Snell, &c., Co., 83 Fed., 603, Judge Bellinger adopted the partial payment rule not because he approved of it upon principle, for he says that the weight of authority is in favor of the equity rule, but

because the creditor, by its conduct, had estopped itself from asking the benefit of any other rule.

The case of Nebraska *v.* Nebraska Savings Bank, 40 Neb., 342, illustrates how far wrong a court, when once started on the wrong path, can go, and without regard to vested rights. Admitting that the equity rule is supported by the weight of authority, and, therefore, having presumably read the cases supporting it, and having seen that the reason why it was thus supported was that a creditor having a lien upon the two funds, both of which would not pay him in full, could not be compelled to exhaust one and prove for the balance only against the other without curtailing his rights, and further having seen that the rights of all creditors in the common fund were to be adjusted as of the date when those rights accrued, without credit or charge because of new rights arising thereafter, yet the Nebraska court conclude that the equity rule is not as equitable as the bankruptcy rule and then follow neither, but the partial payment rule; and having gone thus far against the weight of authority, they seem to think they have not shorn the secured creditor enough, but that he must even be deprived of the right to manage as he sees fit the security given to him before the assignment and over which he has a sole lien, and should turn that over to the representative of all the creditors to be by him handled and adjusted, reserving only to the secured creditor a lien upon the proceeds. Surely a decision which goes to such extremes is not entitled to claim obedience beyond the jurisdiction in which, by law, it is authoritative.

Wheat *v.* Dingle, 32 S. C., 473, does not seem to have been accepted as authority, even in the State of South Carolina. For, in the case of Ragsdale *v.* Winsboro Bank, 45 S. C., 575, it appears that the Court below had ruled with reference to collaterals in accordance with the equity rule and in conflict with Wheat *v.* Dingle, and that no exceptions were pressed against this ruling, showing the acquiescence of counsel in it. Although in the Winsboro Bank case the Court disclaims an assent to this practical overruling of Wheat *v.* Dingle, and attempts to distinguish that case, yet the result, if the distinction taken be

adhered to, will certainly be peculiar. Wheat *v.* Dingle had held that collateral security furnished by the debtor must be exhausted and the creditor's claim proved only for the balance. In the Winsboro Bank case the Court hold that where both principal and surety are primary and secondary debtors upon an obligation and are insolvent, the holder of that obligation may prove it against the estate of the insolvent surety or secondary debtor, without first crediting as payment any sum he may have received since the origin of that trust from the principal or primary debtor, or his assets in assignment. Follow this process of reasoning one step farther, and supposing each of these cases to be adhered to, contrast the result in three cases of very common occurrence:

1. A borrows $1,000 from X and gives him as collateral security the note of B. A and B both make assignments. Under Wheat *v.* Dingle, X, before receiving dividends from the assignment of A, must give credit for all collections from the asssignment of B.

2. A borrows $1,000 from X and gives him his note therefor, with C as surety. Afterwards A and B both make assignments for creditors. Under Ragsdale *v.* Winsboro Bank, X can prove his claim against B as it stood at the date of B's assignment, without regard to any collections he may subsequently make from A or his assets.

3. A borrows $1,000 from X and gives him therefor his note, with C as surety, and also as collateral the note of B. Afterwards A, B and C all become insolvent, and make assignments for creditors. Under Wheat *v.* Dingle, X, in taking dividends from the assets of A and C, must give credit for all dividends theretofore received from the estate of B; but his dividends from the estate of C are not to be reduced by anything he receives from the estate of A after C's assignment; and conversely, his dividends from the estate of A are not to be reduced because of anything he receives from the estate of C after A's assignment.

In other words, in the last instance both the partial payment rule and the equity rule are to be applied to the

same claim. C is confessedly merely a surety in the transaction specified in case 3; when the time for payment comes the creditor, X, has not merely C's liability as surety, but A's as principal and B's as collateral security. C is not allowed to use in exoneration the receipts from A's liability, but presumptively is allowed to use the receipts of X. Had there been no assignment, X could have pursued A, B and C concurrently, and neither could restrain him without payment in full. By making a subsequent assignment C gives to his assets thus becoming owned by the body of his creditors a right which he himself did not possess, viz., to compel X to pursue B to the exoneration of C's assets.

In other words, an attempt to enforce concurrently the rules laid down in these two cases leads to this result: The assignee for the creditors of a surety may reduce the basis for dividends of the creditor by compelling him first to deduct collections he has received from collateral security given to him by the principal at any time, but may not compel him to deduct receipts he gets after the surety's assignment from the direct security furnished by the obligation of the principal, or the substitute for that direct security which the assignment of the principal creates.

Manifestly the cases are inconsistent; and although Ragsdale *v.* Winsboro Bank attempts to distinguish Wheat *v.* Dingle, yet in effect it overrules it. It is impossible logically, we submit, to draw a distinction between security furnished in the form of bills receivable, or other property, and in the form of the obligation of a third person directly upon the loan. The surety, by signing such paper, becomes primarily liable to the creditor and *pro hac vice* makes his assets a part of the debtor's assets, a position from which he can be relieved only by payment, the surety thus acquiring the right himself to pursue the debtor.

What is an assignment for creditors but giving security to creditors additional to what they already have? When the Supreme Court of South Carolina admit, as they do in Ragsdale *v.* The Winsboro Bank, that not merely the weight of authority, but the weight of reason, requires that a creditor's claim against a person secondarily liable

upon a debt shall be established and receive dividends according to its amount when the trust for the creditors of that estate was created, without regard to collections thereafter made from the principal, necessarily they must hold that this rule applies to the proof of all claims, whether against principals or sureties, persons primarily or secondarily liable.

As to what is said about the partial payment rule on pages 13-14, we trust we have sufficiently demonstrated that this rule cannot co-exist with a vested interest in the creditors relating to a period anterior to the time of distribution. This rule requires the adjustment of the amount due upon the claim every time a dividend is declared, and consequently the allowance of interest up to that time; hence it cannot be applied in trusts where no interest is allowed after the inception of the trust. As Judge Taft said with reference to it in the Fidelity Bank case, 16 U. S. Appeals, 465:

"But the rule cannot be sustained, because its adoption proceeds on the theory that the claim of the creditor in reference to the sequestered assets of the debtor and the debt against the debtor are and continue to be one and the same thing. This is a fundamental error. The amount of the claim as proven is a mere measure of the creditor's right and interest in the fund realized from the assets. The claim as proven is a claim *in rem*, and not *in personam*."

Further, the frequent computations and consequent changes in the proportions payable to each creditor differing with every dividend, are, in themselves, sufficient to cause the rejection of the rule as a practical measure of administration where statute, or practice pre ing so long as to have the force of statute, or the ter of the trust which is being administered, do not comp . its adoption.

The merit of the third rule (that in Kellock's case), as compared with the partial payment rule is not merely the lightening of the labor of the liquidating officer, as suggested by appellant's counsel. True, it has that advantage, but that is simply an incident, a resultant detail, and not of the essence. The rule rests, as already stated,

upon a principle radically different; and it is as much in hostility to the partial payment rule as the equity rule is. Its chief merit over the partial payment rule is because it recognizes, as does the equity rule, the fact that the trust has created a vested interest in creditors which cannot be lessened or altered by subsequent events. Its demerit, as compared with the fourth rule as stated (of which it is but a variation), is that under it there is no one fixed time and rule which is applicable to all creditors. Under the Kellock's case rule each creditor selects his own time for initiating his interest in the trust fund; or if he does not select it, then the liquidating officer does; for his interest under this rule initates either when his claim is presented to or allowed by the liquidating officer—the time of the former being determined by the creditor, and that of the latter by the officer. The creditor will, therefore, hurry or postpone his time of proof according as his interest may lie; if his claim carries a high rate of interest and has but little security, and that not soon maturing, he will do well to delay; on the other hand, if his rate of interest be low, or his security be apt to be quickly paid, he will do well to hurry. And conversely with the liquidating officer if the time when the creditor's interest vests rest upon not the presentation but the acceptance or allowance of the claim. Manifestly it is bad policy to adopt, without constraining necessity, a rule permitting interests to be varied by human whim or caprice.

In discussing the equity rule (pp. 14–22), three arguments are stated by which it is supported. To the comment upon the first (pp. 15–19) we respond that it is beside the case. As we have repeatedly said, the equity rule admits that as between debtor and creditor collections from collateral will be considered as payment after an assignment just as much as before, and so the decrees drawn under such rule provide that when the claim is paid, whether from collaterals or dividends, the right to dividends shall cease; but because this is true as between debtor and creditor, it does not follow that it is likewise true with reference to the security given to the creditor for the whole of his debt by an assignment for creditors, or by the equivalent trust of an official receiver-

ship. If each creditor's rights in the trust fund, as compared with his co-creditors, are fixed and established at the creation of that fund, then they cannot be changed by anything that is done afterwards either by the debtor, or a third party, or any one of the creditors, but only by consent of all the creditors. And the enforcing by one creditor of what is merely his right, or the performance by a third party of what is merely his duty, to which a creditor must consent, cannot further establish the consent of that creditor to a change of his relations with his co creditors.

What we have just said is an answer also to the comments made (B., pp. 20-21) upon the second argument, as there stated in favor of the equity rule. The equity rule does not *assume* that the creditor has a lien upon the fund before he proves his claim in the sense in which he uses those words; on the contrary, the cases which adopt the equity rule *decide* that he has such lien. If the question is to be considered as a general one to be determined by the weight of authority, undoubtedly the weight of authority is in favor of the equity rule.

The suggestion that the relative amount of the interest is not determined when the trust is created is not valid. *Id certum est quod certum reddi potest.*

So, too, we have anticipated the response to the answer (on pp. 21-22) to the third argument stated, as adduced in favor of the equity rule. The statement as to the allowance of interest would be more exact if it were said that interest is not allowed against the assets after the date of the insolvency until the claim has been paid in full. This shows it is true that the right of the creditors in the assets is not constantly measured by their claims against the debtor; but it shows further that their right against the assets is measured by their claims against the debtor up to the period of time from which interest is allowed out of the assets; for that establishes their rights *inter sese;* and their rights *inter sese* are the same as their rights against the fund.

As to the case of Holmes *v.* Union Trust Co., 146 Ind., 688, cited in appellant's brief, page 44, it is sufficient to say that the decision of the Court was rested upon the

analogy of their statute which adopts the partial payment rule of distribution in terms, and therefore compelled the decision.

To conclude the reference to the cases cited on pages 28 and 29 as supporting the partial payment rule, we submit that an examination of them will result in striking most from the list, either as not supporting that rule at all, or as depending upon peculiar facts, or as depending upon special provisions of statute preventing the application of the fundamental principle upon which the equity rule rests, viz., the vested interest of the creditor in the trust fund. The few that remain are insufficient to withstand the overwhelming current of authority that where that vested interest does appear it controls in the distribution.

Cases Supporting the Bankruptcy Rule.

Proceeding now to the cases cited on pages 24 and 25 as supporting the bankruptcy rule, we will find that they also need pruning. The Massachusetts cases, it is true, apply the bankruptcy rule, and five of the cases cited come from that State. Yet even there, as already stated, a tendency has recently been shown not to extend that rule beyond previous decisions (see Dickinson *v.* Metaconset Bank, 130 Mass., 132, and Roger Williams Nat. Bank *v.* Hall, 160 Mass., 171). The leading case in Massachusetts is Amory *v.* Francis, 16 Mass., 308. Chief Justice Parker there assumed that the rule in bankruptcy was a rule in chancery as well, and adopted it without considering that thereby one of the most thoroughly established principles in equity was violated, viz., that which declares that a creditor with a superior lien cannot be compelled, by marshalling, to sacrifice any of his advantage. The learned Chief Justice also was mistaken as to the practice of the Court of Chancery in England, as has been since demonstrated by the inquiries made of the Clerks in the Master's office, at the suggestion of Lord Cottenham, and recorded in Mason *v.* Bogg, 2 My. & Cr., 450 451, and from the opinions given in Kellock's case, L. R., 3 Ch., 769. However, the rule adopted in Amory *v.* Francis was shortly after carried into the insolvent statutes of Massachusetts,

and may be considered the settled law of that State. Under these circumstances it is needless to refer to the other Massachusetts cases which have been cited.

In re Frasch, 5 Wash., 344, adopts this Massachusetts rule as the most equitable, and attempts to draw some support from the provisions of the Assignment Act of the State of Washington.

The cases of Creecy *v.* Pearce, 69 N. C., 67, and Moore *v.* Dunn's Admr., 92 N. C., 63, do not reach or rest upon the bankruptcy rule. The contest there was not between creditors, but between a mortgage creditor and a dowress, who attempted to throw the mortgagee upon the personalty in the first instance, where the personal estate was insufficient to pay the debts. The Court required the mortgagee to exhaust first the two-thirds of the real estate free from dower; as to the balance, to prove against the personalty, and for the deficiency, if any, to apply the dower lands. There is nothing from which we can infer that this method of marshalling would not pay the secured creditor in full. Indeed, the inference is to the contrary. So the question as to which was the most equitable, the bankruptcy rule or the equity rule, was not decided. That question did come before the North Carolina Court in Brown *v.* Merchants' Nat Bk., 79 N. C., 244, and Winston *v.* Biggs, 117 N. C., 206, and the equity rule was adopted.

Wurtz *v.* Hart, 13 Iowa, 515, was decided without argument, and apparently without much consideration. Its force is further weakened by the fact that it refers to Dickson *v.* Chorn, 6 Iowa, 19, as controlling, while an examination of the latter case shows that it is no precedent for the other. However, as the subject has been again reviewed during this year by the Supreme Court of Iowa, in Doolittle *v.* Smith, 73 N. W., 867 (cited on p. 29 of Brief), and the Court there approve of the partial payment rule, apparently conceiving it to be the same in principle as the bankruptcy rule, we may concede that that State also is opposed to the adoption of the equity rule. But with reference to this last decision, it should be observed that while the Court rest their conclusion upon the old equitable principle that he who has two securities shall so

enforce his rights as not to injure him who has but one, they neglect its limitation that the creditor having the senior liens cannot be compelled to do injury to himself, or to take a course which will diminish what he would receive had there been no junior lien.

Willis *v.* Holland, decided in 1896 by the Texas Court of Civil Appeals, 36 S. W., 329, does not touch the question under consideration, because there the creditor having the senior lien was to be paid in full at all events, so he could not be injured by the manner in which his securities were marshalled.

In Bell *v.* Fleming's Executor, 1 Beasley, 13, the question for decision was merely whether a secured creditor who proved against the general fund, by that very act surrendered any other security he might have. This question the Chancellor answered in the negative. What was said as to the amount in which the secured creditor could prove and the dividends he should receive was purely *obiter*.

So, too, the question was not presented in Fields *v.* Wheatley's Creditors, 1 Snead., 351, and Winton *v.* Eldridge, 3 Head., 361. In the former case the Bank of Tennessee claimed that as it stood for the State of Tennessee, it was entitled to a preferential lien upon the general assets; while the creditors claimed that it could receive nothing from the general assets until they had received as much therefrom as the bank had obtained from other securities it held. In the latter case the claim of the general creditors only was presented. These claims were overruled, and in the first case the bank, and in the second case the secured creditor, was allowed to prove *pro rata* after exhausting the special security; but upon this last point there was no discussion or contention, and consequently the cases are not authority with reference to it. However, the Supreme Court of Tennessee has had occasion to consider the question, and in Citizens' Bk. v. Kendrick, Pettus & Co., 92 Tenn., 437, they adopted the equity rule.

In Nat. Union Bk. *v.* Nat. Mechanics' Bk., 80 Md., 371, the Court considered the power to compel the application of collaterals before proof against general assets, as fol-

lowing as a corollary from the power to compel the application of collections from those collaterals before dividends as a payment *pro tanto* (as held in Third Nat. Bk. *v.* Lanahan, 66 Md., 461). The former case, like the latter, rests upon what seems to have been a long established practice in Maryland requiring securities or collections therefrom to be credited when proof is made. They throw the practice of the State of Maryland into the scales against us, but not, we submit, upon any principles of general application.

The decisions from Kansas, the American Nat. Bk. *v.* Branch, 57 Kas., 27, and The Security Investment Co. *v.* Richmond Nat. Bk., 58 Kas., 414, were probably influenced by the peculiar facts, and illustrate the old adage that hard cases make bad law. The insolvent was a Kansas investment company which had guaranteed the payment of principal and interest on farm loans negotiated by it; and the Court held that the security for the loans must be exhausted before the assets of the insolvent could be pursued. The cases are but little argued, and contain no reference to the very numerous authorities to the contrary if the guaranty be considered an absolute one, and not merely a guaranty of collectibility.

Thus we find that the bankruptcy rule has been adopted by the Courts of Massachusetts, Maryland (if we consider 80 Md., 371, just mentioned as an adoption there), Iowa and Kansas; and in those States only, so far as the appellant has been able to produce authority. And we find further that the cases where it was applied in Kansas were cases where it would have been denied application in Massachusetts, and that the ruling in Maryland was influenced by a local practice of a century's duration.

Cases Supporting the Kellock's Case Rule.

These will be found on page 37 of brief for appellant. The English, Irish and Canadian cases cited may be dismissed with the remark that they all follow Kellock's case as binding authority without discussion of the principles leading to the decision there announced. As

before stated, we have not been able to find the statutes and rules of Court upon which the Judges of the Court of Appeals, who sat in Kellock's case, based their conclusion that while collections of collateral after proof of claim were not to be applied in reduction of the claim as admitted to proof, collections from collaterals before proof were to be so applied. But we have stated that a real and substantial reason for this distinction is that which has been taken by the Supreme Court of Illinois in Levy *v.* Chicago Nat. Bk., 158 Ill., 88, viz., that the creditor acquires an interest in the assets only by the proof of his claim. Placed upon this ground the decisions accord in perfect harmony with those which support the equity rule; for they all rest upon the same principle that the creditor's rights to dividends is to be based upon the amount of his claim at the time his interest in the assets vests under the statute or deed of trust, or rule of law under which they are to be administered. These cases, therefore, are not at war with the main principle adjudged by the Circuit Courts of Appeal in the Palatka and the Fidelity Bank cases; nor are they at war with the conclusions there reached as to when the creditor's interest in the assets became vested, as the Circuit Courts of Appeal were considering the National Banking Act, while the other courts were considering statutes of other sovereignties, phrased in other terms.

What we have said *supra* with reference to the case of Levy *v.* the Chicago Nat. Bk. relieve us from giving further consideration to it here, and from referring to the earlier case of Furness *v.* Union Nat. Bk., 147 Ill., 570, further than to say that the Levy case is an elaboration of the argument contained in the Furness case, and the decision of some matters which were there but *dicta*.

In Sohier *v.* Loring, 6 Cushing, 537, the Supreme Court of Massachusetts again followed the rulings which had been made by the English courts in administering their bankruptcy acts, to the effect that the amount for which a creditor could prove was the amount which was due him at the time his proof was made, and was not affected, so far as dividends were concerned, by collections he

might thereafter receive from other persons liable upon the same indebtedness. They thus reach the same result that was reached in Kellock's case and in the Illinois cases, but give no reason for it further than that they "adopt the rule applied in bankruptcy" (p. 548). The only other case cited by our opponents under this head is *In re* Meyer, 78 Wis., 615. This was a case where the holder of an overdue note sought to prove it against the endorser, who had made an assignment after the note matured; the maker also was insolvent. The assignee of the endorser sought to compel in effect the application of the partial payment rule, and to require the holder, before receiving dividends from the estate of the endorser, to reduce his claim by any dividends he might in the future receive from the estate of the maker, and dividends paid only upon the balance. The Court rejected this contention as opposed to the very decided preponderance of authority. They do not decide that the creditor must apply as payment any sum which he had received from other parties to the note after the insolvency, but prior to proving his claim, because no such question was presented to them for decision; nor do they even assert this to be the law by way of *obiter*, for what they say upon this subject is in commenting upon a quotation as to the English bankruptcy practice where that rule prevails. It will be observed that this decision, as well as that in Sohier *v.* Loring, 6 Cushing, 537, are in direct conflict with the Kansas cases relied upon by our opponents. We give here a quotation from the Wisconsin court, showing its views as to the weight of authority:

"The learned counsel for the appellant," who was contending for the partial payment rule, "admits that the distinction he suggests has been made by most of the courts in this country and in England, where some different rule has not been established by statute law, and that the great weight of authority is against the rule he contends for."

Then, after saying they must have very good reason to depart from a conclusion adhered to by so many courts, and citing a very large number of cases, some of which

will be found in this brief, and showing that the equitable principle, that marshalling is never applied so as to prejudice a creditor holding a double security, would be infringed if applied as asked, they say:

"It would seem to be imposing too great a task upon us to cite the multitude of cases in which the rule of the court below," which was affirmed, "has been acted upon, and vindicate their reason and logic by quotations from their decisions."

We have shown that the rule thus deduced from the language of the banking act, and enforced by the prior decisions of this Court, is in accord with the very decided preponderance of authority in cases involving similar questions. While the courts of Massachusetts, Maryland, Iowa, Kansas and Washington have held that the secured creditor can be compelled in the first instance to exhaust his security; and while the courts in Alabama, Colorado and Nebraska have contended that the fund should be distributed among the claims as they stand at the time of distribution, we have shown that this Court has rejected the latter view, and that to apply either of these views to the National Banking Act would not only involve a judicial amendment to that act, but would be counter to the law, as heretofore judicially proclaimed in New Hampshire, Connecticut, Rhode Island, New York, Pennsylvania, North Carolina, South Carolina, Tennessee, Kentucky, Ohio, Michigan, Wisconsin, Illinois and Oregon.

We therefore submit that the conclusion of the Court below as to the method of ascertaining the basis for dividends is supported both by reason and authority; and that its decree in that regard should be affirmed.

October, 1898.

WILLIAM WORTHINGTON,
GEO. H. YEAMAN,
Of Counsel for Appellee.

MERRILL *v.* NATIONAL BANK OF JACKSONVILLE.

SAME *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Nos. 54, 55. Argued October 20, 21, 1898. — Decided February 20, 1899.

As the controversy in this case involved the question on what basis dividends in insolvency should have been declared, and therein the enforcement of the trust in accordance with law, this court has jurisdiction of it in equity.

Less than two years having elapsed from the payment of the first dividend to the filing of this bill, and the other creditors of the bank not having been harmed by the delay, no presumption of laches is raised, nor can an estoppel properly be held to have arisen.

A secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals, or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when, from them and from collaterals realized, the claim has been paid in full.

On the seventeenth day of July, A.D. 1891, the First National Bank of Palatka, Florida, a banking association incorporated under the laws of the United States, having its place of business at Palatka, Florida, failed and closed its doors. Subsequently T. B. Merrill was duly appointed receiver of the bank by the Comptroller of the Currency, and entered upon the discharge of his duties. At the time of the failure of the bank, it was indebted to the National Bank of Jacksonville in the sum of $6010.47, on sundry drafts, which indebtedness was unsecured; and also in the sum of $10,093.34, being $10,000, and interest, for money borrowed June 5, 1891, evidenced by a certificate of deposit, which was secured by sundry notes belonging to the First National Bank of Palatka, attached to the certificate as collateral. These notes aggregated $10,896.22, the largest being a note of A. L. Hart for $5350.22. The

National Bank of Jacksonville proved its claim upon the unsecured drafts for $6010.47, and as to this there was no controversy. It also offered to prove its claim for $10,093.34, but the receiver would not permit it to do this, and, under the ruling of the Comptroller of the Currency, it was ordered first to exhaust the collaterals given to secure the certificate of deposit, and then to prove for the balance due, after applying the proceeds of the collaterals in part payment.

The Jacksonville Bank collected all the notes excepting that of A. L. Hart, obtained a judgment on the latter, which it assigned and transferred to the receiver, applied the proceeds of the collaterals which it had collected to its claim on the certificate, and proved for the balance due thereon, being the sum of $4496.44. On December 1, 1892, a dividend of $1573.75 was paid on the claim as thus proven, and on May 17, 1893, a second dividend of $449.64 was paid.

On the eleventh of September, 1894, the Jacksonville Bank filed its bill of complaint in the Circuit Court of the United States for the Southern District of Florida against Merrill as receiver, which set forth the foregoing facts, complained of the action of the receiver in not permitting proof for the full amount of the certificate of deposit, and alleged that it "gave due notice that it would demand a *pro rata* dividend upon the whole amount due your orator, without deducting the amount collected on collateral security, to wit, that it would demand a *pro rata* dividend upon $16,103.81, and interest thereon from the 17th day of July, A.D. 1891."

The prayer of the bill was, among other things, for a *pro rata* distribution on the entire amount of the indebtedness.

The defendant demurred to the bill, and, the demurrer having been overruled, answered, denying "that the complainant gave due notice that it would demand a *pro rata* dividend upon the whole amount due to it without deducting the amount collected on collateral security;" and averring to the contrary that "the complainant accepted the said ruling of the said Comptroller without demur and accepted from the said Comptroller, through this defendant, without protesting notice of any kind, the checks of the said Comptroller

in payment of the dividends mentioned in the bill, and that it was not until the 15th of March, 1894, that the complainant gave notice of any kind that it dissented from the said ruling of the Comptroller and would demand payment upon a different basis."

Sundry exceptions were taken to the answer, which were overruled, and the cause was set down for final hearing on bill and answer.

The Circuit Court entered its decree, January 29, 1896, that complainant was entitled to receive dividends on the whole face of the indebtedness due July 17, 1891, less the dividends actually paid to it; that the receiver declare the dividend on the basis of the whole claim, and pay it out of any assets which were in his hands March 15, 1894; and that he render an account.

From this decree the receiver prosecuted an appeal to the Circuit Court of Appeals for the Fifth Circuit. That court, differing from the Circuit Court as to the form of its decree, reversed it and remanded the cause, with directions to enter a decree that the Jacksonville Bank was entitled to prove its claims to the entire amount of the indebtedness, and to the payment thereon of the same dividends as had been paid on other indebtedness of the Palatka Bank, with interest on such dividends from the date of the declaration thereof, less a credit of the sums which had been paid as dividends on the part of the claim theretofore allowed provided the dividends theretofore paid and thereafter to be paid on the sum of $10,093.34, together with the amounts theretofore and thereafter received on the collaterals securing that indebtedness, should not exceed one hundred cents on the dollar of the principal and interest of said debt; that the receiver recognize the Jacksonville Bank as creditor of the Palatka Bank in said sum of $10,093.34 as of July 17, 1891, and pay dividends as aforesaid thereon, or certify the same to the Comptroller of the Currency, to be paid in due course of administration; and that the Jacksonville Bank receive, before further payment to other creditors, its due proportion of the dividends as thus declared, with interest. 41 U. S. App. 529. From that decree,

after the mandate of the Circuit Court of Appeals had been sent down to the Circuit Court, and proceedings had thereunder, an appeal was taken and perfected to this court and is numbered 54 of this term.

The decree was entered by the Circuit Court in pursuance of the mandate of the Circuit Court of Appeals, July 27, 1896, and the receiver prayed an appeal therefrom to the Circuit Court of Appeals, which was by that court dismissed on motion of the Jacksonville Bank. 41 U. S. App. 645. From this decree of dismissal, an appeal was allowed and perfected to this court, and is numbered 55 of this term.

These appeals were argued together.

Mr. Edward Winslow Paige and *Mr. Francis F. Oldham* for appellant.

Mr. William Worthington for appellee. *Mr. George H. Yeaman* was on his brief. *Mr. J. C. Cooper* filed a brief for appellee.

Mr. Chief Justice Fuller, after making the above statement, delivered the opinion of the court.

The Circuit Court of Appeals reversed the decree of the Circuit Court with specific directions. Nothing remained for the Circuit Court to do except to enter a decree in accordance with the mandate, and, for the purposes of an appeal to this court, the decree of the Circuit Court of Appeals was final. The mandate went down and the Circuit Court entered its decree in strict conformity therewith before the appeal in No. 54 was prosecuted to this court. This promptness of action did not, however, cut off that appeal, and any difficulty in our dealing with the cause in the Circuit Court was obviated by the second appeal, which brings before us in No. 55 the record subsequent to the first decree of the Circuit Court of Appeals.

It is contended that the bill should have been dismissed because of adequate remedy at law, and on the ground of

laches and estoppel. As the controversy involved the question on what basis dividends should have been declared, and therein the enforcement of the administration of the trust in accordance with law, we have no doubt of the jurisdiction in equity.

Nor was the lapse of time such as to raise any presumption of laches, nor could an estoppel properly be held to have arisen. Less than two years had elapsed from the payment of the first dividend to the filing of the bill, and the other creditors of the insolvent bank had not been harmed by the temporary submission of complainant to the ruling of the Comptroller. The decree affected only assets on hand or such as might be subsequently discovered; and if the other creditors had no rights superior to that of complainant, they lost nothing by the reduction of their dividends, if any, afterwards declared to be paid out of such assets.

The inquiry on the merits is, generally speaking, whether a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals, or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when from them and from collaterals realized, the claim has been paid in full.

Counsel agree that four different rules have been applied in the distribution of insolvent estates, and state them as follows:

"Rule 1. The creditor desiring to participate in the fund is required first to exhaust his security and credit the proceeds on his claim, or to credit its value upon his claim and prove for the balance, it being optional with him to surrender his security and prove for his full claim.

"Rule 2. The creditor can prove for the full amount, but shall receive dividends only on the amount due him at the time of distribution of the fund; that is, he is required to credit on his claim, as proved, all sums received from his security, and may receive dividends only on the balance due him.

"Rule 3. The creditor shall be allowed to prove for, and receive dividends upon, the amount due him at the time of proving or sending in his claim to the official liquidator, being required to credit as payments all the sums received from his security prior thereto.

"Rule 4. The creditor can prove for, and receive dividends upon, the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided that he shall not receive more than the full amount due him."

The Circuit Court and the Circuit Court of Appeals held the fourth rule applicable, and decreed accordingly.

This was in accordance with the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Chemical National Bank* v. *Armstrong*, 16 U. S. App. 465, Mr. Justice Brown, Circuit Judges Taft and Lurton, composing the court. The opinion was delivered by Judge Taft, and discusses the question on principle with a full citation of the authorities. We concur with that court in the proposition that assets of an insolvent debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor, on proof of his claim, acquires a vested interest in the trust fund; and, this being so, that the second rule before mentioned must be rejected, as it is based on the denial, in effect, of a vested interest in the trust fund, and concedes to the creditor simply a right to share in the distributions made from that fund according to the amount which may then be due him, requiring a readjustment of the basis of distribution at the time of declaring every dividend, and treating, erroneously as we think, the claim of the creditor to share in the assets of the debtor, and his debt against the debtor, as if they were one and the same thing.

The third and fourth rules concur in holding that the creditor's right to dividends is to be determined by the amount due him at the time his interest in the assets becomes vested, and is not subject to subsequent change, but they differ as to the point of time when this occurs.

In *Kellock's case*, L. R. 3 Ch. App. 769, it was held that

the creditor's interest in the general fund to be distributed vested at the date of presenting or proving his claim; and this rule has been followed in many jurisdictions where statutory provisions have been construed to require an affirmative election to become a beneficiary thereunder. For instance, the cases in Illinois construing the assignment act of that State, which are well considered and full to the point, hold that the interest of each creditor in the assigned estate "only vests in him when he signifies his assent to the assignment by filing his claim with the assignee." *Levy* v. *Chicago National Bank*, 158 Illinois, 88; *Furness* v. *Union National Bank*, 147 Illinois, 570.

On the other hand, the Supreme Court of Pennsylvania in *Miller's Appeal*, 35 Penn. St. 481, and many subsequent cases, has held, necessarily in view of the statutes of Pennsylvania regulating the matter, that the interest vests at the time of the transfer of the assets in trust. In that case the debtor executed a general assignment for the benefit of creditors. Subsequently the assignor became entitled to a legacy which was attached by a creditor, who realized therefrom $2402.87. It was held that such creditor was notwithstanding entitled to a dividend out of the assigned estate on the full amount of his claim at the time of the execution of the assignment. Mr. Justice Strong, then a member of the state tribunal, said: "By the deed of assignment, the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors, and each creditor owned such a proportional part of the whole as the debt due to him was of the aggregate of the debts. The extent of his interest was fixed by the deed of trust. It was, indeed, only equitable; but whatever it was, he took it under the deed, and it was only as a part owner that he had any standing in court when the distribution came to be made. . . . It amounts to very little to argue that Miller's recovery of the $2402.87 operated with precisely the same effect as if a voluntary payment had been made by the assignor after his assignment; that is, that it extinguished the debt to the amount recovered. No doubt it did, but it is not as a creditor that he is entitled to a distributive share of

the trust fund. His rights are those of an owner by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determines the extent of his ownership. The reduction of that debt, therefore, after the creation of the trust, and after his ownership had become vested, it would seem, must be immaterial."

Differences in the language of voluntary assignments and of statutory provisions naturally lead to particular differences in decision, but the principle on which the third and fourth rules rest is the same. In other words, those rules hold, together with the first rule, that the creditor's right to dividends is based on the amount of his claims at the time his interest in the assets vests by the statute, or deed of trust, or rule of law, under which they are to be administered.

The first rule is commonly known as the bankruptcy rule, because enforced by the bankruptcy courts in the exercise of their peculiar jurisdiction, under the bankruptcy acts, over the property of the bankrupt, in virtue of which creditors holding mortgages or liens thereon might be required to realize on their securities, to permit them to be sold, to take them on valuation, or to surrender them altogether, as a condition of proving against the general assets.

The fourth rule is that ordinarily laid down by the chancery courts, to the effect that, as the trust created by the transfer of the assets by operation of law or otherwise, is a trust for all creditors, no creditor can equitably be compelled to surrender any other vested right he has in the assets of his debtor in order to obtain his vested right under the trust. It is true that, in equity, a creditor having a lien upon two funds may be required to exhaust one of them in aid of creditors who can only resort to the other, but this will not be done when it trenches on the rights or operates to the prejudice of the party entitled to the double fund. Story Eq. Jur. (13th ed.) § 633; *In re Bates*, 118 Illinois, 524. And it is well established that in marshalling assets, as respects creditors, no part of his security can be taken from a secured creditor until he is completely satisfied. Leading Cases in Equity, White & Tudor, Vol. II, Part 1, 4th Amer. ed., pp. 258, 322.

In *Greenwood* v. *Taylor*, 1 Russ. & Myl. 185, Sir John Leach applied the bankruptcy rule in the administration of a decedent's estate, and remarked that the rule was "not founded, as has been argued, upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the administration of assets;" and referred to the doctrine requiring a creditor having two funds as security, one of which he shares with others, to resort to his sole security first. But *Greenwood* v. *Taylor* was in effect overruled by Lord Cottenham in *Mason* v. *Bogg*, 2 Myl. & Cr. 443, 488, and expressly so by the Court of Appeal in Chancery in *Kellock's case;* and the application of the bankruptcy rule rejected.

In *Kellock's case*, Lord Justice W. Page Wood, soon afterwards Lord Chancellor Hatherly, said:

"Now in the case of proceedings with reference to the administration of the estates of deceased persons, Lord Cottenham put the point very clearly, and said: 'A mortgagee has a double security. He has a right to proceed against both, and to make the best he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see.'

"Mr. De Gex, who argued this case very ably, says that the whole case is altered by the insolvency. But where do we find such a rule established, and on what principle can such a rule be founded, as that where a mortgagor is insolvent the contract between him and his mortgagee is to be treated as altered in a way prejudicial to the mortgagee, and that the mortgagee is bound to realize his security before proceeding with his personal demand.

"It was strongly pressed upon us, and the argument succeeded before Sir J. Leach in *Greenwood* v. *Taylor*, that the practice in bankruptcy furnishes a precedent which ought to be followed. But the answer to that is, that this court is not to depart from its own established practice, and vary the nature of the contract between mortgagor and mortgagee by analogy to a rule which has been adopted by a court having a peculiar jurisdiction, established for administering the property

of traders unable to meet their engagements, which property that court found it proper and right to distribute in a particular manner, different from the mode in which it would have been dealt with in the Court of Chancery. . . . We are asked to alter the contract between the parties by depriving the secured creditor of one of his remedies, namely, the right of standing upon his securities until they are redeemed."

And it was the established rule in England prior to the Judicature Act, 38 and 39 Victoria, c. 77, that in an administration suit a mortgagee might prove his whole debt and afterwards realize his security for the difference, and so as to creditors with security, where a company was being wound up under the Companies Act of 1862. 1 Daniel's Ch. Pr. 384; *In re Withernsea Brick Works*, L. R. 16 Ch. Div. 337.

Certainly the giving of collateral does not operate of itself as a payment or satisfaction either of the debt or any part of it, and the debtor, who has given collateral security, remains debtor, notwithstanding, to the full amount of the debt; and so in *Lewis* v. *United States*, 92 U. S. 618, 623, it was ruled that: "It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor."

Doubtless the title to collaterals pledged for the security of a debt vests in the pledgee so far as necessary to accomplish that purpose, but the obligation to which the collaterals are subsidiary remains the same. The creditor can sue, recover judgment, and collect from the debtor's general property, and apply the proceeds of the collateral to any balance which may remain. Insolvency proceedings shift the creditor's remedy to the interest in the assets. As between debtor and creditor, moneys received on collaterals are applicable by way of payment, but as under the equity rule the creditor's rights in the trust fund are established when the fund is created, collections subsequently made from, or payments subsequently made on, collateral, cannot operate to change the relations between the creditor and his co-creditors in respect of their rights in the fund.

As Judge Taft points out, it is because of the distinction

between the right *in personam* and the right *in rem* that interest is only added up to the date of insolvency, although after the claims as allowed are paid in full, interest accruing may then be paid before distribution to stockholders.

In short, the secured creditor is not to be cut off from his right in the common fund because he has taken security which his co-creditors have not. Of course, he cannot go beyond payment, and surplus assets or so much of his dividends as are unnecessary to pay him must be applied to the benefit of the other creditors. And while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entitled to retain their securities until the indebtedness due them is extinguished.

The contractual relations between borrower and lender, pledging collaterals, remain, as is said by the New York Court of Appeals in *People* v. *Remington*, 121 N. Y. 328, 336, "unchanged when insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement." The creditor looks to the debtor to repay the money borrowed, and to the collateral to accomplish this in whole or in part, and he cannot be deprived either of what his debtor's general ability to pay may yield, or of the particular security he has taken.

We cannot concur in the view expressed by Chief Justice Parker in *Amory* v. *Francis*, 16 Mass. 308, 311, (1820) that "the property pledged is in fact security for no more of the debt, than its value will amount to; and for all the rest, the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole, if no security were taken."

We think the collateral is security for the whole debt and every part of it, and is as applicable to any balance that remains after payment from other sources as to the original amount due; and that the assumption is unreasonable that the creditor does not rely on the responsibility of his debtor according to his promise.

The ruling in *Amory* v. *Francis* was disapproved, shortly

after it was made, by the Supreme Court of New Hampshire in *Moses* v. *Ranlet*, 2 N. H. 488, (1822) Woodbury, J., afterwards Mr. Justice Woodbury of this court, delivering the opinion, and is rejected by the preponderance of decisions in this country, which sustain the conclusion that a creditor, with collateral, is not on that account to be deprived of the right to prove for his full claim against an insolvent estate. Many of the cases are referred to in *Bank* v. *Armstrong*, and these and others given in the Encyclo. of Law and Eq. 2d ed. vol. 3, p. 141.

Does the legislation in respect to the administration of national banks require the application of the bankruptcy rule? If not, we are of opinion that the equity rule was properly applied in this case.

By section 5234 of the Revised Statutes, and section 1 of the act of June 30, 1876, c. 156, 19 Stat. 63, the Comptroller of the Currency is authorized to appoint a receiver to close up the affairs of a national banking association when it has failed to redeem its circulation notes, when presented for payment; or has been dissolved and its charter forfeited; or has allowed a judgment to remain against it unpaid for thirty days; or whenever the Comptroller shall have become satisfied of its insolvency after examining its affairs. Such receiver is to take possession of its effects, liquidate its assets and pay the money derived therefrom to the Treasurer of the United States.

Section 5235 of the Revised Statutes requires the Comptroller, after appointing such receiver, to give notice by newspaper advertisement for three consecutive months, "calling on all persons who may have claims against such association to present the same, and to make legal proof thereof."

By section 5242, transfers of its property by a national banking association after the commission of an act of insolvency, or in contemplation thereof, to prevent distribution of its assets in the manner provided by the chapter of which that section forms a part, or with a view to preferring any creditor except in payment of its circulating notes, are declared to be null and void.

Section 5236 is as follows:

"From time to time, after full provision has first been made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

In *Cook County National Bank* v. *United States*, 107 U. S. 445, it was ruled that the statute furnishes a complete code for the distribution of the effects of an insolvent national bank; that its provisions are not to be departed from; and that the bankrupt law does not govern distribution thereunder. The question now before us was not treated as involved and was not decided, but the case is in harmony with *Bank* v. *Colby*, 21 Wall. 609, and *Scott* v. *Armstrong*, 146 U. S. 499, which proceed on the view that all rights, legal or equitable, existing at the time of the commission of the act of insolvency which led to the appointment of the receiver, other than those created by preference forbidden by section 5242, are preserved; and that no additional right can thereafter be created, either by voluntary or involuntary proceedings. The distribution is to be "ratable" on the claims as proved or adjudicated, that is, on one rule of proportion applicable to all alike. In order to be "ratable" the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be the date of the declaration of insolvency. *White* v. *Knox*, 111 U. S. 784. In that case it appeared that the Miners' National Bank had been put in the hands of a receiver by the Comptroller of the Currency, December 20, 1875. White presented a claim for $60,000, which the Comptroller refused to allow. White then brought suit to have his claim adjudicated, and on June 23, 1883, recovered judgment for $104,523.72, be-

ing the amount of his claim with interest to the date of the judgment. Meanwhile the Comptroller had paid the other creditors ratable dividends, aggregating sixty-five per cent of the amounts due them, respectively, as of the date when the bank failed. When White's claim was adjudicated, the Comptroller calculated the amount due him according to the judgment as of the date of the failure, and paid him sixty-five per cent on that amount. White admitted that he had received all that was due him on the basis of distribution assumed by the Comptroller, but claimed that he was entitled to have his dividends calculated on the face of the judgment, which would give him several thousand dollars more than he had received, and he applied for a mandamus to compel the payment to him of the additional sum. The writ was refused by the court below and its judgment was affirmed. Mr. Chief Justice Waite, speaking for the court, said: "Dividends are to be paid to all creditors, ratably, that is to say, proportionally. To be proportionate they must be made by some uniform rule. They are to be paid on all claims against the bank previously proved and adjudicated. All creditors are to be treated alike. The claim against the bank, therefore, must necessarily be made the basis of the apportionment. . . . The business of the bank must stop when insolvency is declared. Rev. Stat. § 5228. No new debt can be made after that. The only claims the Comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him or by the adjudication of a competent court to have had their origin in something done before the insolvency. It is clearly his duty, therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution."

In *Scott* v. *Armstrong*, 146 U. S. 499, 510, it was argued that the ordinary equity rule of set-off in case of insolvency did not apply to insolvent national banks in view of sections 5234, 5236 and 5242 of the Revised Statutes. It was urged "that these sections by implication forbid this set-off because they require that after the redemption of the circulating notes has been fully provided for, the assets shall be ratably distributed among the creditors, and that no preferences given or suffered,

in contemplation of or after committing the act of insolvency, shall stand;" and "that the assets of the bank existing at the time of the act of insolvency include all its property without regard to any existing liens thereon or set-offs thereto." But this court said: "We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency. Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

The set-off took effect as of the date of the declaration of insolvency, but outstanding collaterals are not payment, and the statute does not make their surrender a condition to the receipt by the creditor of his share in the assets.

The rule in bankruptcy went upon the principle of election; that is to say, the secured creditor "was not allowed to prove his whole debt, unless he gave up any security held by him on the estate against which he sought to prove. He might realize his security himself if he had power to do so, or he might apply to have it realized by the Court of Bankruptcy, or by some other court having competent jurisdiction, and might prove for any deficiency of the proceeds to satisfy his demand; but if he neglected to do this and proved for his whole debt, he

was bound to give up his security." Robson, Law Bank. 336. But it was only under bankrupt laws that such election could be compelled. *Tayloe* v. *Thompson*, 5 Pet. 358, 369.

And we are unable to accept the suggestion that compulsion under those laws was the result merely of the provision for ratable distribution, which only operated to prevent preferences, and to make all kinds of estates, both real and personal, assets for the payment of debts, and to put specialty and simple contract creditors on the same footing; and so gave to all creditors the right to come upon the common fund. Equality between them was equity, but that was not inconsistent with the common law rule awarding to diligence, prior to insolvency, its appropriate reward; or with conceding the validity of prior contract rights.

We repeat that it appears to us that the secured creditor is a creditor to the full amount due him, when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto, though the receiver may redeem or be subrogated as circumstances may require.

Whatever Congress may be authorized to enact by reason of possessing the power to pass uniform laws on the subject of bankruptcies, it is very clear that it did not intend to impinge upon contracts existing between creditors and debtors, by anything prescribed in reference to the administration of the assets of insolvent national banks. Yet it is obvious that the bankruptcy rule converts what on its face gives the secured creditor an equal right with other creditors into a preference against him, and hence takes away a right which he already had. This a court of equity should never do, unless required by statute, at the time the indebtedness was created.

Dissenting Opinion: White, Harlan, McKenna, JJ.

The requirement of equality of distribution among creditors by the national banking act involves no invasion of prior contract rights of any such creditors, and ought not to be construed as having, or being intended to have, such a result.

Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends, and their right to retain their securities cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited.

The case was rightly decided by the Circuit Court of Appeals; its decree in No. 54 is

Affirmed, and the decree of the Circuit Court entered July 27, 1896, in pursuance of the mandate of that court, also affirmed, and the case remanded accordingly.

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA, dissenting.

The court now decides: 1st. That on the failure of a national bank a creditor thereof whose debt is secured by pledge is entitled to be recognized and classed by the Comptroller of the Currency to the full amount of his debt, without in any way taking into account the collaterals by which the debt is secured, and on the amount so recognized he is entitled to be paid out of the general assets the sum of any dividends which may be declared. 2d. That this right to be classed for the full amount of the debt, without regard to the value of the collaterals, is fixed by the date of the insolvency and continues to the final distribution, whatever may be the change in the debt thereafter brought about by the realization of the securities, provided only that the sums received by the creditor by way of dividends and from the amount collected

from the collaterals do not exceed the entire debt and therefore extinguish it.

I am constrained to dissent from these propositions, because, in my opinion, their enforcement will produce inequality among creditors and operate injustice, and, as a necessary consequence, are inconsistent with the National Banking Act.

It cannot be doubted that the acts of Congress, which regulate the collection and distribution of the assets of an insolvent national bank, are controlling. It is clear that every creditor who contracts with such bank does so subject to the provisions directing the manner of distributing the assets of such bank in case of its insolvency, and therefore that the terms of the act enter into and form part of every contract which such bank may make. Now, the act of Congress makes it the duty of the receiver appointed by the Comptroller to liquidate the affairs of a failed national bank, to take possession of and realize its assets, Rev. Stat. § 5234; to call, by advertisement for ninety days, upon creditors, to present and make legal proof of their claims, Rev. Stat. § 5235; and, from the proceeds of the assets, the Comptroller is directed to make a "ratable dividend" on the recognized claims, Rev. Stat. § 5236. To prevent preferences, the law, moreover, directs that all contracts from which preferences may arise, made after the commission of an act of insolvency or in contemplation thereof, "shall be utterly null and void." Rev. Stat. § 5242.

It seems to me superfluous to demonstrate that the rules now upheld by which a creditor holding security is decided to be entitled to disregard the value of his security and take a dividend upon the whole amount of the debt from the general assets, violates the principle of equality and ratable distribution which the act of Congress establishes. Is it not evident that if one creditor is allowed to reap the whole benefit of his security, and at the same time take from the general assets a dividend, on his whole claim, as if he had no security, he thereby obtains an advantage over the other general creditors, and that he gets more than his ratable share of the general assets? Let me illustrate the unavoida-

ble consequence of the doctrine now recognized. A loans a national bank $5000, and takes as the evidence of such loan a note of the bank for the sum named, without security. The lender is thus a general or unsecured creditor for the sum of $5000. B loans to the same bank $5000, without security. He is applied to for a further loan, and agrees to loan another $5000 on receiving collateral worth $5000, and requires that a new note be executed for the amount of both loans, which recites that it is secured by the collateral in question. While theoretically, therefore, B is a secured creditor for $10,000, he practically has no security for $5000 thereof. Insolvency supervenes. The general assets received by the Comptroller equal only fifty per cent of the claims. Now, under the rule which the court establishes, A on his unsecured claim of $5000 collects a dividend of but $2500, thereby losing $2500; B, on the other hand, who proves $10,000, taking no account whatever of his collateral, realizes by way of dividends $5000, and by collections on collaterals a similar amount, with the result that though as to $5000 he was, in effect, an unsecured creditor, he loses nothing. B is thus in precisely as good a situation as though he had originally demanded and received from the borrowing bank collateral securities equal in value to the full amount loaned. It is thus apparent that the application of the rule would operate to enable B — who, I repeat, virtually held no collateral security for $5000 of the sums loaned — to be paid his entire debt, though the assets of the insolvent estate of the borrower paid but fifty cents on the dollar, while another creditor holding an unsecured claim for $5000 fails to realize thereon more than $2500. Is it not plain that this result is produced by practically a double payment to B, that is, by recognizing B as a preferred creditor in the specific property, of the value of five thousand dollars, pledged to him, withdrawing that property from the general assets, and allowing B to solely appropriate it, yet permitting him, when the secured part of his debt is thus virtually satisfied, to *again assert* the same secured portion of the debt against other assets, by a claim upon the general fund in the hands of the receiver for the full amount

loaned. The consequence of the receipt of this extra sum upon account of the already fully secured portion of the original loan is that B is enabled to offset it against the deficient dividend on the unsecured portion of the debt, one equalling the other, thus closing the transaction without loss to him.

Let us suppose also the case of a creditor of a national bank who recovers a judgment for $100,000 and levies the same upon real estate of the bank worth only $50,000. While the legal title and possession is still in the bank a receiver is appointed and takes possession of the real estate. Certainly it cannot be contended that this judgment lien holder is not in equally as good a position as the holder of a mortgage lien or other collateral security. The doctrine of the court, however, if applied to the judgment lien holder, would authorize him to demand that the receiver treat the real estate as not embraced in the general assets, and that the creditor be allowed to enforce his whole claim against the other assets irrespective of the value of the specific security acquired by his lien.

That the doctrine maintained by the court also tends to operate a discrimination as between secured creditors, in favor of the one holding collateral securities not susceptible of prompt realization, is, I think, demonstrable. Thus a secured creditor who takes collaterals maturing on the same day with the debt owing to himself, which collaterals consist of negotiable notes, the makers of which and endorsers upon which are pecuniarily responsible, finds the collaterals promptly paid when deposited for collection, and if his debtor should become insolvent the day after payment the creditor could only claim for the residue of the debt still unpaid. On the other hand, a creditor of the same debtor, the debt to whom matures at the same time as that owing the other creditor, and is secured by collaterals also due contemporaneously, has the collaterals protested for non-payment, and when the debtor fails the collaterals have not been realized. While the first debtor, who had received first class collateral, can collect dividends against the estate of his insolvent debtor only for the unpaid portion of the claim, losing a part of such residue by the inability of the

estate to pay in full, the debtor who received poor collateral collects dividends out of the general assets on his whole claim, and if he eventually realizes on his securities may come out of the transaction without the loss of one cent. These illustrations, to my mind, adequately portray the inequality and injustice which must arise from the application of the rules of distribution now sanctioned by the court.

The fallacies which it strikes me are involved in the two propositions sanctioned by the court are these: First: The erroneous assumption that although the act of Congress contemplates that the dividend should be declared out of the general assets after the secured creditors have withdrawn the amount of their security, it yet provides that the secured creditor who has withdrawn his security and thus been *pro tanto* satisfied, can still assert his whole claim against the general assets, just as if he had no security and had not been allowed to withdraw the same. Second: The mistaken assumption that the act confers upon the secured creditor a new and substantial right, enabling him to obtain, as a consequence of the failure of the bank, an advantage and preference which would not have existed in his favor had the failure not supervened. This arises from holding that the insolvency fixed the amount of the claim which the secured creditor may assert, as of the time of the insolvency; thereby enabling him to ignore any collections which he may have realized from his securities after the failure, and permitting him to assert as a claim, not the amount due at the time of the proof, but, by relation, the amount due at the date of the failure, the result being to cause the insolvency of the bank to relieve the creditor holding security from the obligation to impute any collections from his collateral to his debt, so as to reduce it by the extent of the collections, a duty which would have rested on him if insolvency had not taken place. Third: By presupposing that, because before failure a secured creditor had a legal right to ignore the collaterals held by him and resort for the whole debt, in the first instance, against the general estate of his debtor, it would impair the obligation of the contract to require the secured creditor in case of insolvency

to take into account his collaterals and prevent him from asserting his whole claim, for the purpose of a dividend, against the general assets. But the preferential right arising from the contract of pledge is in nowise impaired by compelling the creditor to first exercise his preference against the security received from the debtor, and thus confine him to the specific advantage derived from his contract. Further, however, as the contract, construed in connection with the law governing it, restricts the secured as well as the unsecured creditor to a ratable dividend from the general assets, the secured creditor is prevented from enhancing the advantage obtained as a result of the contract for security, by proving his claim as if no security existed, since to allow him to so do would destroy the rule of ratable division, subject and subordinate to which the contract was made. A forcible statement of the true doctrine on the foregoing subject was expressed in the case of *Société Générale de Paris* v. *Geen*, 8 App. Cas. 606. The question before the court arose upon the construction to be given to a clause of the English bankrupt act of 1869, incidental to the requirement of a section, expressly embodied for the first time in a bankrupt act, that the secured creditor should in some form account for the collateral held by him in proving his claim against the general estate. In considering the restriction upon the remedy of a secured creditor produced by the insolvency, and the consequent right of such creditor to receive only a ratable dividend on the balance of the debt after the deduction of the value of the collaterals, Lord Fitzgerald said (p. 620):

"Under ordinary circumstances each creditor is at liberty to pursue at his discretion the remedies which the law gives him; but when insolvency intervenes, and the debtor is unable to pay his debts, the position of all parties is altered — the fund has become inadequate, and the policy of the law is to lead to equality. In pursuing that policy the bankrupt law endeavors to enforce an equal distribution, whilst it respects the rights of those who have previously, by grant or otherwise, acquired some security or some preferable right."

To resort, however, to reasoning for the purpose of en-

deavoring to demonstrate that where a statute does not allow preferences in case of insolvency, and commands a ratable distribution of the assets, a secured creditor cannot be allowed to disregard the value of his security and prove for the whole debt, seems to me to be unnecessary, since that he cannot be permitted to so do, under the circumstances stated, has been the universal rule applied in bankruptcy in England and in this country from the beginning.

In the earliest English bankrupt act, 34 & 35 Hen. VIII, c. 4, the distribution of the general assets of the bankrupt was directed to be made, "for true satisfaction and payment of the said creditors; that is to say, to every of the said creditors, a portion rate and rate alike, according to the quantity of their debts." In the statute of 13 Eliz., c. 7, (and which was in force in this particular when the consolidated bankrupt statute of 6 Geo. IV, c. 16, was adopted,) the distribution of assets was directed in language similar to that just quoted from the statute of Henry VIII. Under these statutes, from the earliest times, it was held by the Lord Chancellors of England, having the supervision of the execution of the bankrupt statutes, that a secured creditor could not retain his collateral security and prove for his whole debt, but must have his security sold, and prove for the rest of the debt only. Lord Somers, in *Wiseman* v. *Carbonell*, (1695) 1 Eq. Cas. Ab. 312, pl. 9; Lord Hardwicke, in *Howel, petitioner*, (1737) 7 Vin. Ab. 101, pl. 13, and in *Ex parte Grove*, (1747) 1 Atk. 104; Lord Thurlow, in *Ex parte Dickson*, (1789) 2 Cox Ch. 194, and in *Ex parte Coming*, (1790) 2 Cox Ch. 225; Cooke's Bankrupt Laws, (1st ed. 1786) 114, and (4th ed. 1799) 119.

In 1794, 4 Brown's Ch. Rep. star paging 550, the prevailing practice with respect to a sale of a mortgage security was regulated by a general order formulated by Lord Chancellor Loughborough, wherein, among other things, it was provided that in case the proceeds of sale should be insufficient to pay and satisfy what should be found due upon the mortgage, "that such mortgagee or mortgagees be admitted a creditor or creditors under such commission for such deficiency, and to receive a dividend or dividends thereon out of the bankrupt's estate or

effects, ratably and in proportion with the rest of the creditors seeking relief under the said commission," etc.

Concerning the practice in bankruptcy, Lord Chancellor Eldon, in 1813, in *Ex parte Smith*, 2 Rose, 63, said: "The practice has been long established in bankruptcy, not to suffer a creditor holding a security to prove unless he will give up that security, or the value has been ascertained by the sale of it. The reason is obvious: Till his debt has been reduced by the proceeds of that sale, it is impossible correctly to say what the actual amount of it is. . . . It is, however, clearly within the discretion of the court to relax this rule, and cases may occur in which it would be for the benefit of the general creditors to relax it."

The first two bankrupt statutes enacted in this country (April 4, 1800, c. 19, 2 Stat. 19; August 4, 1841, c. 9, 5 Stat. 440) required a ratable distribution of the assets, and it was conceded in argument that the universal practice enforced under these acts was to require a creditor holding collateral security to deduct the amount of his security and prove only for the residue of the debt. This court, speaking through Mr. Justice Story, in 1845, in *In re Christy*, 3 How. 292, declared that under the act of 1841, "if creditors have a pledge or mortgage for their debt they may apply to the court to have the same sold, and the proceeds thereof applied towards the payment of their debts *pro tanto* and to prove for the residue."

As the universal rule and practice in bankruptcy in England and in this country, up to and including the bankrupt act of 1841, was solely the result of the statutory requirement that the assets should be ratably distributed among the general creditors, my mind fails to discern why the requirement for ratable distribution of the assets in the act for the liquidation of failed national banks, should not have the same meaning and produce the same result as the substantially similar provisions had always meant and had always operated in England for hundreds of years and in this country for many years before the adoption by Congress of the act for the liquidation of national banks. Indeed, the fact that the requirement of ratable distribution had by a long course of practice

and judicial construction in England and in this country required the secured creditor to account for his security, before proving against the general assets, gives rise to the application of the elementary canon of construction that where words are used in a statute, which words at the time had a settled and well-understood meaning, their insertion into the statute carries with them a legislative adoption of the previous and existing meaning.

The reasoning by which it is maintained that the requirement for ratable distribution should not be applied in the act providing for the liquidation of an insolvent national bank may be thus summed up: True it is, that universally in bankruptcy in England and in this country the rule was as above stated, but outside of bankruptcy a different practice prevailed in England, known as the chancery rule; and as the winding up of an insolvent national bank does not present a case of bankruptcy, its liquidation is governed by such chancery rule and not by the bankruptcy rule. The bankruptcy rule, it is said, is commonly so called because enforced by bankruptcy courts in the exercise of their "peculiar" jurisdiction, and the courts which refuse to apply the rule generally declare that it arose from express provisions in bankrupt statutes requiring a creditor to surrender his collaterals or deduct for their value before proving against the estate.

Pretermitting for a moment an examination of this reasoning, it is to be remarked in passing that the argument, if sound, rests upon the hypothesis that all the bankruptcy laws from the beginning in England and in our own country, and the universal course of decision thereon and the practice thereunder, have worked out inequality and injustice by depriving a secured creditor of rights which it is now asserted belonged to him and which could have been exercised by him without producing inequality. This deduction follows, for it cannot be that, if not to compel the creditor to deduct produces no inequality or injustice, then to compel him to do so would have precisely the same result. The two opposing and conflicting rules cannot both be enforced and yet in each instance equality result. At best, then, the contention admits that by

the consensus of mankind not to compel the secured creditor to deduct the value of his collaterals before proving produces inequality, for of all statutes those relating to bankruptcy have most for their object an equal distribution of the assets of the insolvent among his creditors.

It is worthy also of notice, in passing, that the reasoning to which we have referred rests upon the assumption that the act of Congress providing for the liquidation of the affairs of a national bank and a distribution of the assets thereof among the creditors is not substantially a bankrupt statute. It certainly is a compulsory method provided by law for winding up the concerns of an insolvent bank, for preventing preferences, and for securing an equal and ratable division of the assets of the association among its creditors. And it assuredly can be safely assumed that Congress in adopting the rule of ratable distribution in the National Banking Act did not intend that the words embodying the rule should be so construed as to produce a result contrary to that which for hundreds of years had been recognized as necessarily implied by the employment of similar language. It may also, I submit, be likewise considered as certain that it was not intended, in using the words "ratable distribution" in the statute, to bring about an unequal instead of a ratable distribution of the general assets.

But, coming to the proposition itself, is there any foundation for the assertion that the rule or practice in bankruptcy requiring the secured creditor to account for his security was the result of something peculiar in the jurisdiction of bankruptcy courts, other than the requirement contained in bankruptcy statutes that the assets should be distributed ratably among creditors, and is there any merit in the contention that the rule was the consequence of an express provision in such laws imposing the obligation referred to on the secured creditor?

A careful examination of every bankrupt statute in England, from the first statute of 34 & 35 Hen. VIII, c. 4, down to and including the Consolidated Bankrupt Act of 6 Geo. IV, c. 16, fails to disclose any provision sustaining the statement that

the rule in bankruptcy depended upon express statutory requirement, and on the contrary shows that it was simply a necessary outgrowth of the command of the statute that there should be an equal distribution of the bankrupt's assets.

I submit that not only an examination of the English statutes makes clear the truth of the foregoing, but that its correctness is placed beyond question by the statement of Lord Chancellor Eldon respecting proof in bankruptcy by a secured creditor, already adverted to, that "till his debt has been reduced by the proceeds of that sale," (that is, of the security,) "it is impossible correctly to say what the actual amount of it is." And, as an authoritative declaration of the origin of the rule, the opinion of Vice Chancellor Malins, in *Ex parte Alliance Bank*, (1868) L. R. 3 Ch., note at page 773, is in point. The Vice Chancellor said:

"This rule" (requiring a creditor to realize his security and prove for the balance of the debt only) "does not depend on any statutory enactment, but on a rule in bankruptcy, established irrespective of express statutory enactment, and under the statute of *Elizabeth*, which provides: 'Or otherwise to order the same (*i.e.* the assets) to be administered for the due satisfaction and payment of the said creditors, that is to say, for every of the said creditors a portion, rate and rate alike, according to the quantity of his and their debts.'"

Indeed, not only was the obligation of the secured creditor to account for his security derived from the provision as to ratable distribution, but from that provision also originated the equally well-settled rule causing interest to cease upon the issuance of the commission of bankruptcy. As early as 1743, Lord Hardwicke, in *Bromley* v. *Goodere*, 1 Atkyns, 75, 79, in speaking of the suspension of interest by the effect of bankruptcy, said: "There is no direction in the act for that purpose, and it has been used only as the best method of settling the proportion among the creditors, that they may have a rate-like satisfaction, and is founded upon the equitable power given them by the act."

Whilst, generally, the claim that the bankruptcy rule was the creature of an express provision of the bankruptcy acts,

other than the requirement as to a ratable distribution of assets, rests upon a mere statement to that effect without any reference to the specific text of the bankrupt act which it was assumed made such requirement, in one instance, in the brief of counsel in an early case in this country, *Findlay* v. *Hosmer*, (1817) 2 Conn. 320, the statement is made in a more specific form. A particular section of an English bankrupt statute is there referred to, as, in effect, expressly requiring a secured creditor to account for his collaterals in order to prove against the general assets. The statute thus referred to was section 9 of 21 Jac. I, c. 19. But an examination of the section relied on shows that it in nowise supports the assertion. The pertinent portion of the section reads as follows:

". . . all and every creditor and creditors having security for his or their several debts, by judgment, statute, recognizance, specialty with penalty or without penalty, or other security, or having no security, or having made attachments in London, or any other place, by virtue of any custom there used, of the goods and chattels of any such bankrupt, whereof there is no execution or extent served and executed upon any the lands, tenements, hereditaments, goods, chattels and other estate of such bankrupts, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such judgment, statute, recognizance, specialty, attachments or other security for any more than a ratable part of their just and due debts, with the other creditors of the said bankrupt, without respect to any such penalty or greater sum contained in any such judgment, statute, recognizance, specialty with penalty, attachment or other security."

The securities other than attachment referred to in this section were manifestly embraced in the class known at common law as "personal" security, as distinguished from "real" security or security upon property. (Sweet's Dict'y English Law, *verbo* Security.) In other words, the effect of the section was but to forbid preferences in favor of creditors which at law would have resulted from the particular form in which the debt was evidenced, and from which form a claim would

be raised to a higher rank than a simple contract debt. That this is the significance of the word "security" as used in this section is shown by the following excerpt from Cooke's treatise on bankrupt laws, published in 1786. At page 114 he says:

"The aim of the legislature in all the statutes concerning bankrupts, being, that the creditors should have an equal proportion of the bankrupt's effects, creditors of every degree must come in equally; nor will the nature of their demands make any difference, unless they have obtained actual execution, or taken some pledge or security before an act of bankruptcy committed. For when a creditor comes to prove his debt he is obliged to swear whether he has a security or not; and if he has, and insists upon proving, he must deliver it up for the benefit of his creditors, unless it be a joint security from the bankrupt and another person," etc.

The fact that the expression "security" contained in the section referred to had no reference to security on property, is further demonstrated by the subsequent statute of 6 Geo. IV, c. 9, § 103, which reënacted in an altered form the ninth section of the statute of James; for the reënacted section, although it referred in broad terms to securities generally, yet especially excepted the case of a mortgage or pledge. The section is as follows:

"SEC. 103. And be it enacted, That no creditor having security for his debt, or having made any attachment in London, or any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a ratable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy."

Is it pretended anywhere that after the reënactment of section 9 of the statute of James I, found in section 103, c. 9, 6 Geo. IV, that the obligation of a secured creditor to account for his collateral before he took a dividend out of the general assets ceased to exist? Certainly, there is no such

contention. If, however, that duty of the general creditor arose, not from the provision as to ratable distribution, but from the provisions of section 9 of the act of James as claimed, then necessarily such obligation on the part of the general creditor would have ceased immediately on the enactment of the statute of 6 Geo. IV, which expressly excepted the mortgage creditor from the operation of the particular section which it is contended imposed the duty on the mortgage creditor to account. The continued enforcement of the rule which required the mortgage creditor to deduct the value of his security before proving against general assets after the reënactment of section 9 of the statute of George referred to, can lead to but one conclusion; that is, that the duty of the mortgage creditor before existing arose from the provision for ratable distribution and not from the terms of section 9 of the statute of James, since that duty continued to be compelled after the reënactment of that section in terms which renders it impossible to contend that that section created the duty.

A similar course of reasoning applies to bankrupt statutes of this country.

Section 31 of our first bankrupt statute, act April 4, 1800, c. 19, 2 Stat. 19, 30, was, in substance and effect, similar to the provision in the act of James. The statute of 1800 is said to have been a consolidation of the provisions of previous English bankrupt statutes, *Tucker* v. *Oxley*, 5 Cranch, 34, 42; *Roosevelt* v. *Mark*, 6 Johns. Ch. 266, 285; and in *Tucker* v. *Oxley*, Chief Justice Marshall declared that, for that reason, the decisions of the English judges as to the effect of those acts might be considered as adopted with the text that they expounded. Section 31 reads as follows:

"Sec. 31. And be it further enacted, That in the distribution of the bankrupt's effects, there shall be paid to every of the creditors a portion-rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance or specialty, or having an attachment under any of the laws of the individual States, or of the United States, on the estate of such bank-

rupt, (provided, there be no execution executed upon any of the real or personal estate of such bankrupt, before the time he or she became bankrupts) shall not be relieved upon any such judgment, statute, recognizance, specialty or attachment, for more than a ratable part of his debt, with the other creditors of the bankrupt."

This provision of the act of 1800 was, however, omitted from the bankrupt act of 1841, manifestly because it had become unnecessary. The later statute contained in the fifth section a general provision forbidding all preferences except in favor of two classes of debts, thus rendering it superfluous to enumerate cases in which there should be no preference. It was, however, under the act of 1841, which was drafted by Mr. Justice Story, (2 Story's Life of Story, 407,) that this court, speaking through that learned justice, in *In re Christy*, already cited, declared that a secured creditor must account for his security when proving against the bankrupt estate. How it can be now argued that the requirement that such creditor should only so prove his claim was the result of a provision not found in the act of 1841, and clearly shown by all the antecedent legislation not to refer to a creditor holding property security, my mind fails to comprehend.

True it is, that both in our own act of 1867 and in the English bankrupt act of 1869, there were inserted express provisions requiring a secured creditor to account for his collaterals before proving against the general assets. But this was but the incorporation into the statutes of the rule which had arisen as a consequence of the requirement for a ratable distribution and which had existed for hundreds of years before the statutes of 1867 and 1869 were adopted. In other words, the express statutory requirement only embodied in the form of a legislative enactment what theretofore from the earliest time had been universally enforced, because of the provision for a ratable distribution.

The rule in bankruptcy imposing the duty upon the creditor to account for his security before proving being then the result of the provision of the bankrupt laws requiring ratable distribution, I submit that the same requirements upon such

creditor should be held to arise from a like provision contained in the act of Congress under consideration.

But, coming to consider the chancery rule which it is contended lends support to the doctrines applied in the cases at bar.

The foundation upon which the so called chancery rule rests is the case of *Mason* v. *Bogg*, 2 Myl. & Cr. 443, decided in 1837, where Lord Chancellor Cottenham expressed his approval of the contention that a mortgage creditor, despite the death and insolvency of his debtor, possessed the contract right to assert his whole claim against general assets in the course of administration in chancery, without regard to his mortgage security. The question was not directly decided, however, as to whether the creditor might prove in the administration for the whole amount of the debt, but was reserved. As stated, however, the reasoning of the court favored the existence of such right, upon the theory that a court of chancery, when administering assets, *in the absence of a statute regulating the subject*, could not deprive a secured creditor of legal rights previously existing which he might have asserted at law, although by permitting the exercise of such rights preferences in the general assets would arise.

The next case in point of time in England, and indeed the one upon which most reliance is placed by those favoring the chancery rule, is *Kellock's case*, reported in L. R. 3 Ch. 769, involving two appeals, and argued before Sir W. Page Wood, L. J., and Sir C. J. Selwyn, L. J. The cases arose in the winding up of companies by virtue of the statute of 25 & 26 Victoria, c. 89. The issue presented in each case was whether a creditor having collateral security was entitled to dividends upon the full amount of the debt without reference to the value of collaterals; and in one of the cases the lower court applied the doctrine supported by the reasoning in *Mason* v. *Bogg*, while in the other the lower court decided the bankruptcy rule governed. The appellate court held that the chancery practice should be followed. The claim was made that the secured creditor ought not to be allowed to take a dividend on the full amount of his claim, because, among

other reasons, of section 133 of the act, which provided as follows:

"133. The following Consequences shall ensue upon the voluntary Winding-up of a Company:

"(1.) The Property of the Company shall be applied in satisfaction of its Liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the Regulations of the Company, be distributed amongst the Members according to their Rights and Interests in the Company."

This contention, however, was answered by Lord Justice Wood, who said (p. 778):

"There is a clause in the Companies Act of 1862 which says that in a voluntary winding up equal distribution is to be made among creditors; an expression similar to which, in 13 Eliz. c. 7, appears to have led to the establishment of the rule in bankruptcy."

He then called attention to the fact that a voluntary winding up was not limited to cases of insolvent companies, but might be resorted to on behalf of a solvent one; and he proceeded to comment upon the fact that in previous winding-up acts, "when the legislature intended proceedings to be conducted according to the course in bankruptcy, it said so," concluding with the declaration that the omission to do so in the case before the court indicated the purpose of Parliament that the court should be governed by the chancery rule. Lord Justice Selwyn, in a measure, also adopted this view, saying (p. 782):

"I think, therefore, that the onus is clearly thrown on those persons who come here and say that when the legislature, with a knowledge of the existence of the difference between the practice in bankruptcy and the practice in chancery, entrusted the winding up of the companies to the Court of Chancery, and said in express terms that the practice of the Court of Chancery was to prevail, they intended by some implication or inference to diminish, prejudice or affect the rights of creditors. I can find no trace of any such intention. I think, therefore, we are bound to follow the established practice of the Court of Chancery, especially when we find that

that practice has been followed ever since the passing of the Winding-up Act, and so long as winding-up orders have been made in the Court of Chancery."

The whole subject has been set at rest, however, in Great Britain, by section 25 of the Judicature Act of August 5, 1873, c. 66, and by an amendment thereto adopted August 11, 1875, c. 77, which expressly required that in the administration in chancery of an insolvent estate of one deceased and in proceedings in the winding up of an insolvent company under the Companies Acts, "the same rule shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, . . . as may be in force for the time being under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt."

So that now, in Great Britain, in all proceedings involving the distribution of an insolvent fund, a secured creditor can only prove for the balance which may remain after deduction of the proceeds or value of collateral security.

In view, therefore, of the English legislation in 1873 and 1875, which has rendered it impossible in cases of insolvency to apply the doctrine of the *Kellock case*, we need not particularly notice decisions rendered in England subsequent to 1868, when the *Kellock case* was decided, particularly as the tribunals which rendered such decisions were subordinate to the Court of Appeal and necessarily bound by its rulings.

Now, I submit, as the English Chancellors, from the date of the enactment of the earliest English bankrupt law, felt constrained to compel a secured creditor to account for his security before proving against the general assets of the bankrupt estate, because Parliament had directed a ratable distribution of all such assets, it cannot in consonance with sound reasoning be said that this court is to apply the chancery rule to the distribution of the assets of an insolvent national bank as to which Congress has directed a ratable distribution, because in England a different rule was for a time applied to an act of Parliament providing not solely for the liquidation of an insolvent estate, but equally to a solvent and

insolvent one, and which rule was so applied in England because a particular statute was construed as requiring that the practice pursued in chancery in administering upon estates should govern.

It is worthy of note that Lord Justice Wood, after stating in his opinion in the *Kellock case* that the bankruptcy rule was "adopted by a court having a peculiar jurisdiction, established for administering the property of traders unable to meet their engagements," conceded that the provision in the statute of 13 Eliz. c. 7, requiring equal distribution, "led to the establishment of the rule in bankruptcy." But the Lord Justice took the cases then under consideration out of the operation of the provision of the statute of Elizabeth because of provisions found in the Company Act which, in his opinion, gave rise to a contrary view in cases governed by that act. The distribution of the assets of a failed national bank under the act of Congress, it is obvious, presents the "peculiar" features which Lord Justice Wood had in mind, since the requirement of ratable distribution is the exact equivalent of the provision contained in the statute of Elizabeth. But the reasoning now employed to cause the rule announced in the *Kellock case* to apply so as to defeat the ratable distribution provided by the act of Congress, is made to rest upon the assumption that the act of Congress does not contain the peculiar requirement which was found in the bankruptcy acts, from which the duty of the secured creditor to account for his security before taking a dividend from the general assets arose. It comes, then, to this: That the theory by which the obsolete doctrine of the *Kellock case* is made to apply rests upon an assumption which repudiates the reasoning of that case; in other words, that the result of the *Kellock case* is taken and applied to this case, whilst the reasoning upon which the decision of the *Kellock case* was based is in effect denied.

That to permit a secured creditor to retain his specific contract security and also to prove against the general assets of his insolvent debtor for the whole amount of the debt was deemed to work out inequality is shown not only by the fact

that it was not applied in bankruptcy, but that in the administration of equitable, as contradistinguished from legal, assets, courts of equity, following the maxim *Equitas est quasi equalitas*, would not permit claimants against equitable assets to share in the distribution of such assets, until they had accounted for any advantage gained by the assertion against the general estate of the debtor of a preference permitted at law. *Morrice* v. *Bank of England*, Cases Temp. Talb. 218; *Sheppard* v. *Kent*, 2 Vern. 435; *Deg* v. *Deg*, 2 P. W. 412, 416; *Chapman* v. *Esgar*, 1 Sm. & G. 575; *Bain* v. *Sadler*, L. R. 12 Eq. 570; *Purdy* v. *Doyle*, 1 Paige, 558; *Bank of Louisville* v. *Lockridge*, 92 Kentucky, 472; 1 Story Eq. Jur. 12th ed. p. 543; Watson, 1 Comp. Ex. 2d rev. ed. ch. 11, p. 35.

It was undoubtedly from a consideration of this fundamental rule of equity, in construing the statutory requirement for ratable division of general assets, that the bankruptcy rule was formulated. That rule, however, in effect, declared that secured creditors might retain their preferential contract rights in particular portions of the estate of the insolvent debtor, but that it was the purpose of Parliament, in commanding ratable distribution, that general assets, that is, assets disencumbered of liens, should be distributed only among the general or unsecured creditors; the necessary effect being that a secured creditor could not prove against general assets without surrendering his security, thus becoming a general or unsecured creditor *for the whole amount of the debt*, or realizing upon the security or in some form accounting for its value, in which latter contingency he would be general or unsecured creditor only *for the deficiency*. That the bankruptcy rule was deemed to be founded upon equitable principles, I think, is demonstrated by the statement of Lord Hardwicke in a case already mentioned, *Bromley* v. *Goodere*, 1 Atk. 77, where, after referring to the act of 13 Eliz. c. 7, he said:

"It is manifest that this act intended to give the commissioners an equitable jurisdiction as well as a legal one, for they have full power and authority to take by their discretions such order and direction as they shall think fit; and that this has

been the construction ever since; and therefore when petitions have come before the Chancellor, he has always proceeded upon the same rules, as he would upon causes coming before him upon the bill, *The rules of equity.*"

The foregoing reasoning renders it unnecessary to review at length the opinion delivered by the Circuit Court of Appeals for the Sixth Circuit in *Chemical National Bank* v. *Armstrong*, 16 U. S. App. 465, to which the court has referred, as the conclusions announced by the Circuit Court of Appeals were rested on the assumption that the bankruptcy rule was the creature of an express statutory requirement, and that to prevent a secured creditor from proving for his whole debt, as of the time of the insolvency, without regard to his collaterals, would deprive him of a contract right, both of which contentions have been fully considered in what I have already said. Nor is the case of *Lewis* v. *United States*, 92 U. S. 619, also referred to in the opinion of the court in the case at bar, controlling upon the question here presented. True, it was said in the *Lewis case*, in passing, and upon the admission of counsel, that "It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor," citing the *Kellock case* and two other English and two Pennsylvania cases involving the question of the rights of a creditor having the securities of distinct estates of separate debtors. But the controversy before the court in the *Lewis case* was of this latter character, being between the United States, as creditor of a partnership and holding collaterals belonging to the partnership, and the trustee in bankruptcy of the separate estates of individual members of the partnership. The government was seeking to assert against such separate estates a right of preference given to it by statute. The court decided that as the United States had a paramount lien upon all the assets of every debtor for the full satisfaction of its claim, it was unaffected by the bankruptcy statutes, and therefore was not controlled by any provision found therein for ratable distribution or otherwise. It is apparent, therefore, that the court, by the quoted statement did not decide that a court of equity

would apply the doctrine there set forth, where the rights of the secured creditor were limited and controlled by statute. If the secured creditor, who is allowed in the case now decided to disregard his security and prove for the whole amount of his claim had a paramount lien not only upon his collaterals, but upon each and every asset of the insolvent bank, the rule in the *Lewis case* would be apposite. But that is not the character of the case now before the court, since here a secured creditor has no paramount lien upon anything but his collaterals, and is governed in his recourse against the general assets by the requirement that there should be a ratable distribution.

As the case before us is to be controlled by the act of Congress, it would appear unnecessary to advert to state decisions construing local statutes; but inasmuch as those decisions were referred to and cited as authority, I will briefly notice them. They are referred to in the margin and divide themselves into four classes: 1. Those which maintain that where ratable distribution is required, the creditor must account for his security before proving.[1] 2. Those cases which, on the contrary, decide that to allow the creditor to prove for his whole claim without deduction of security, is not incompatible with ratable distribution, and hold that the security need not be taken into account.[2] 3. Those cases which, whilst seemingly deny-

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[1] *Amory* v. *Francis*, (1820) 16 Mass. 308; *Farnum* v. *Boutelle*, (1847) 13 Met. 159; *Vanderveer* v. *Conover*, (1838) 1 Harr. 487; *Bell* v. *Fleming's Executors*, (1858) 1 Beasley, (12 N. J. Eq.) 13, 25; *Whittaker* v. *Amwell National Bank*, (1894) 52 N. J. Eq. 400; *Fields* v. *Creditors of Wheatley*, (1853) 1 Sneed, (Tenn.) 351; *Winton* v. *Eldridge*, (1859) 3 Head, (Tenn.) 361; *Wurtz* v. *Hart*, (1862) 13 Iowa, 515; *Searle, Ex'or*, v. *Brumback, Assignee*, (1862) 4 Western Law Monthly, (Ohio) 330; *In re Frasch*, (1892) 5 Wash. 344; *National Union Bank* v. *National Mechanics Bank*, (1895) 80 Maryland, 371; *American National Bank* v. *Branch*, (1896) 57 Kansas, 327; *Investment Co.* v. *Richmond National Bank*, (1897) 58 Kansas, 414.

[2] *Findlay* v. *Hosmer*, (1817) 2 Conn. 350; *Moses* v. *Ranlet*, (1822) 2 N. H. 488; *West* v. *Bank of Rutland*, (1847) 19 Vermont, 403; *Walker* v. *Baxter*, (1854) 26 Vermont, 710, 714; *In the matter of Bates*, (1886) 118 Illinois, 524; *Furness* v. *Union National Bank*, (1893) 147 Illinois, 570; *Levy* v. *Chicago National Bank*, (1895) 158 Illinois, 88; *Allen* v. *Danielson*, (1887) 15 R. I. 480; *Greene* v. *Jackson Bank*, (1895) 18 R. I. 779; *People* v. *Remington*,

ing the obligation of the secured creditor to account for his security, yet, practically, work out a contrary result by requiring deduction upon collaterals as collected, and affording remedies to compel prompt realization of collaterals.[1] 4. Those which originated in purely local statutes and which hold that the secured creditor can prove for the whole amount without reference to either the bankruptcy or the chancery rule.[2] And in the margin I supplement the compilation heretofore made by a reference to some state statutes and decisions referring to statutes which expressly provide that the claimants upon an insolvent estate can only prove for the balance due, after deduction of any security held.[3]

Of course, for the purposes of this case, only the first two classes of cases need be considered. The first class is well represented by two Massachusetts cases: *Amory* v. *Francis*, 16 Mass. 308, and *Farnum* v. *Boutelle*, 13 Met. 159. In the first-named case Chief Justice Parker said (p. 311): "If it were not so, the equality, intended to be produced by the

(1890) 121 N. Y. 328; *Third National Bank of Detroit* v. *Haug*, (1890) 82 Michigan, 607; *Kellogg* v. *Miller*, (1892) 22 Oregon, 406; *Winston* v. *Biggs*, (1895) 117 N. C. 206.

[1] *In re Estate of McCune*, (1882) 76 Missouri, 200; *State* v. *Nebraska Savings Bank*, (1894) 40 Nebraska, 342; *Jamison* v. *Alder-Goldman Commission Co.*, (1894) 59 Arkansas, 548, 552; *Philadelphia Warehouse Co.* v. *Anniston Pipe Works*, (1895) 106 Alabama, 357; *Erle* v. *Lane*, (1896) 22 Colorado, 273.

[2] *Shunk's and Freedley's Appeals*, (1845) 2 Penn. St. 304; *Morris* v. *Olwine*, (1854) 22 Penn. St. 441, 442; *Keim's Appeal*, (1856) 27 Penn. St. 42; *Miller's Appeal*, (1860) 35 Penn. St. 481; *Patten's Appeal*, (1863) 45 Penn. St. 151. And see a reference to the cases in Pennsylvania, in *Boyer's Appeal*, (1894) 163 Penn. St. 143.

[3] Indiana: — *Combs* v. *Union Trust Co.*, 146 Ind. 688, 691; Kentucky: — Statutes, 1894, (Barbour & Carroll's ed.) c. 7, sec. 74, p. 193; *Bank of Louisville* v. *Lockridge*, 92 Kentucky, 472; Massachusetts: — Act of April 23, 1838, c. 163, sec. 3; General Statutes, 1860, ch. 118, sec. 27; Michigan: — 2 How. St. sec. 8824, p. 2156; Minnesota: — By statute March 8, 1860, the security is made the primary fund, to which resort must be had before a personal judgment can be obtained against the debtor for a deficit, *Swift* v. *Fletcher*, 6 Minn. 550; New Hampshire: — Laws 1862, ch. 2594; South Carolina: — *Piester* v. *Piester*, 22 S. C. 139; *Wheat* v. *Dingle*, 32 S. C. 473; Texas: — Civil Stats. 1897, art. 83; Acts 1879, ch. 53, sec. 13; *Willis* v. *Holland*, (1896) 36 S. W. Rep. 329.

bankrupt laws, would be grossly violated, and the creditor holding the pledge would, in fact, have a greater security than that pledge was intended to give him. For originally it would have been security only for a portion of the debt equal to its value; whereas by proving the whole debt, and holding the pledge for the balance, it becomes security for as much more than its value, as is the dividend, which may be received upon the whole debt."

In the later case, Chief Justice Shaw announced the rule as follows: 13 Met. 164:

"If the mortgage remained in force at the time of the decease of the debtor, then it is very clear, as well upon principle as authority, that the creditors cannot prove their debt, without first waiving their mortgage, or, in some mode, applying the amount thereof to the reduction of the debt, and then proving only for the balance. *Amory* v. *Francis*, 16 Mass. 308."

The second class of cases may be typified by the case of *People* v. *Remington*, 121 N. Y. 328, where the conclusion of the court was placed upon the ground that the rule in bankruptcy originated in an express requirement in the bankrupt acts other than that for a ratable distribution. The court, speaking through Gray, J., said (p. 332):

"Some confusion of thought seems to be worked by the reference of the decision of the question to the rules of law governing the administration of estates in bankruptcy; but there is no warrant for any such reference. The rules in bankruptcy cases proceeded from the express provisions of the statute, and they are not at all controlling upon a court administering, in equity, upon the estates of insolvent debtors. The bankruptcy act requires the creditor to give up his security, in order to be entitled to prove his whole debt; or, if he retains it, he can only prove for the balance of the debt, after deducting the value of the security held. The jurisdiction in bankruptcy is peculiar and special, and a particular mode of administration is prescribed by the act."

Having thus eliminated the bankruptcy rule, the court reviewed the decisions in *Mason* v. *Bogg* and *Kellock's case*, and held those cases to be controlling. The *Remington case*,

therefore, as well as those of which it is a type, need not be further reviewed, as the fundamental error upon which they rest has been fully stated in what I have previously said.

It is necessary, however, to call attention to the fact that in the cases which decline to apply the rule in bankruptcy and refuse to enforce the provision for ratable distribution, there is an entire want of harmony as to the time when the rights of creditors are fixed with respect to the amount of the claim which may be proved against general assets, some holding that dividends are to be paid on the amount due at the date of insolvency, others on the amount due at the time of proof; and others upon the sum due when dividends are declared. This confusion is the necessary outcome of the erroneous premise upon which the cases rest. A similar confusion, moreover, I submit, is manifested by the rule now announced by the court; since whilst it is avowedly rested upon the defunct chancery rule exemplified in *Mason* v. *Bogg* and the *Kellock case*, yet in effect it fails to follow the very rule upon which the decision is based. This is clear when it is borne in mind that the chancery rule was decided in both *Mason* v. *Bogg* and the *Kellock case* to be that the amount of the claim of the creditor was fixed by the date when proof was actually made, and yet under the authority of the chancery rule and the cases in question the court now decides that the rights of the secured creditor are fixed by insolvency. Thus the chancery rule is applied and at the same time repudiated in an important particular, for the grave difference between allowing a secured creditor to prove only for the amount due when proof was made and therefore compelling him to account for all collections realized on collaterals up to that time, and allowing him long after insolvency to prove, by relation, as of the date of the insolvency, and disregard the collections actually made, is manifest. In this connection it may not be amiss to call attention to the fact that if the bankruptcy rule was applied in the proof of claims, the amount of the claim would not vary, whether the date of insolvency or the time when proof was made was held to be the date when the rights of the creditor in the fund were fixed.

Moreover, I submit that the propositions now adopted, which reject the bankruptcy rule, rest on reasoning which, if it be logically applied, requires the enforcement of the bankruptcy rule in its integrity. It seems to me it has been shown by the doctrine announced by Lord Hardwicke, in 1743, *Bromley* v. *Goodere*, *supra*, that the stoppage of interest on the claims of all creditors was but an essential evolution of the principle of ratable distribution. This stoppage of interest at the period named is now upheld by the rule sanctioned by this court. This, then, takes the provision of the bankruptcy rule which favors the secured creditor and which arises alone from ratable division, and gives him the benefit of it whilst at the same time rejecting the obligation to account which arises from and depends on the very principle of ratable distribution which is in part enforced. To repeat, it strikes my mind that the conclusion now announced is this, that the obsolete chancery rule both applies and does not apply, that the bankruptcy rule at the same time does not apply and does apply, the result of this conflict being to so interpret the act of Congress as to strike from it the beneficent provision for equality of distribution among general creditors.

Mr. Justice Gray dissenting.

While also unable to concur in the opinion of the majority of the court, I prefer to rest my dissent upon the effect of the legislation of Congress, read in the light of the English statutes and decisions before the American Revolution, and of the judgments of the courts of the United States — without particularly considering the cases in England in recent times, or the conflicting decisions made in the courts of the several States under local statute or usage or upon general theory. As the course of reasoning in support of this view traverses part of the ground covered by the other dissenting justices, I shall endeavor to state it as shortly as possible.

The English bankrupt acts in force at the time of the Declaration of Independence, so far as they touched the distribution of a bankrupt's estate among his creditors, were the

statute of 13 Eliz. (1571) c. 7, § 2, which directed the estate to be applied to the "true satisfaction and payment of the said creditors, that is to say, to every of the said creditors a portion, rate and rate like, according to the quantity of his or their debts;" and the statute of 21 James I, (1623) c. 19, § 8 (or § 9), which made more specific provisions against allowing any creditors, whether "having security" or not, to prove "for any more than a ratable part of their just and due debts with the other creditors of the said bankrupt." As appears on the face of this provision, the word "security" was evidently there used, not as including a mortgage or other instrument executed by the debtor by way of pledging part of his property as collateral security for the payment of a debt, but merely as designating a bond or writing which was evidence of the debt itself as a direct personal obligation; and the objects of the provision would appear to have been to put all debts, whether by specialty or by simple contract, upon an equal footing in the ratable distribution of a bankrupt's estate, and to permit the real amount only of any debt, and not any larger sum named in a bond or other specialty, to be proved in bankruptcy. 4 Statutes of the Realm, 539, 1228; 2 Cooke's Bankrupt Laws, (4th ed.) [18] [33]; 1 Ib. 119; Bac. Ab. Obligations, A; 3 Bl. Com. 439.

Neither of those statutes contained any provision whatever for deducting the value of collateral security and proving the rest of the debt. Yet, from the earliest period of which there are any reported cases, it was uniformly held — without vouching in any provision of the bankrupt acts, other than those directing a ratable distribution among all the creditors — and had long before the American Revolution become the settled practice in the Court of Chancery, that a creditor could not retain collateral security received by him from the bankrupt and prove for his whole debt, but must have his collateral security sold and prove for the rest of the debt only. The authorities upon this point are collected in the opinion of Mr. Justice White, *ante*, 153.

After the American Revolution, the provision of the statute of James I was thrice reënacted, with little modification.

Stats. 5 Geo. IV, (1824) c. 98, § 103; 6 Geo. IV, (1825) c. 16, § 108; 12 & 13 Vict. (1849) c. 106, § 184. But the rule established by the decisions and practice of the Court of Chancery, as to the proof of secured debts, was never expressly recognized in any of the English bankrupt acts until 1869, when provisions to that effect were inserted in the statute of 32 & 33 Vict. c. 71, § 40. And there is no trace of a different rule in England, in proceedings in equity for the distribution of the estate of any insolvent debtor or corporation, until more than sixty years after the Declaration of Independence. *Amory* v. *Francis*, (1820) 16 Mass. 308, 311; *Greenwood* v. *Taylor*, (1830) 1 Russ. & Myl. 185; *Mason* v. *Bogg*, (1837) 2 Myl. & Cr. 443. In 1868, indeed, the Court of Chancery declined to apply the bankruptcy rule to proceedings under the winding-up acts. *Kellock's case*, L. R. 3 Ch. 769. But Parliament, by the Judicature Acts of 1873 and 1875, applied that rule to such proceedings. Stats. 36 & 37 Vict. c. 66, § 25 (1); 38 & 39 Vict. c. 77, § 10. And Sir George Jessel, M. R., has pointed out the absurdity of having different rules in the cases of living and of dead bankrupts. *In re Hopkins*, (1881) 18 Ch. D. 370, 377.

The first bankrupt act of the United States, enacted in 1800, was in great part copied from the earlier bankrupt acts of England, and condensed the provisions, above mentioned, of the statutes of Elizabeth and of James I, in this form: "In the distribution of the bankrupt's effects, there shall be paid to every of the creditors a portion-rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance or specialty, or having an attachment under any of the laws of the individual States, or of the United States, on the estate of such bankrupt, (provided there be no execution executed upon any of the real or personal estate of such bankrupt, before the time he or she became bankrupts,) shall not be relieved upon any such judgment, statute, recognizance, specialty or attachment, for more than a ratable part of his debt with the other creditors of the bankrupt." Act of April 4, 1800, c. 19, § 31; 2 Stat. 30. That provision must have received the

same construction that had been given by the English judges to the statutes therein reënacted. *Tucker* v. *Oxley*, (1809) 5 Cranch, 34, 42; *Scott* v. *Armstrong*, (1892) 146 U. S. 493, 511.

The bankrupt act of 1841, which is well known to have been drafted by Mr. Justice Story, omitted that section, and made no specific provision whatever as to the proof of secured debts; but simply provided that "all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being *bona fide* debts, shall be entitled to share in the bankrupt's property and effects, *pro rata*, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets." Act of August 19, 1841, c. 9, § 5; 5 Stat. 444.

Yet Mr. Justice Story, both in the Circuit Court and in this court, laid it down, as an undoubted rule, that a secured creditor could prove only for the rest of the debt, after deducting the value of the security given him by the bankrupt himself of his own property. *In re Babcock*, 3 Story, (1844) 393, 399, 400; *In re Christy*, (1845) 3 How. 292, 315.

The omission by that eminent jurist, when framing the act of 1841, of all specific provisions on the subject as unnecessary, and his repeated judicial declarations, after he had been habitually administering that act for three or four years, recognizing that rule as still in force, compel the inference that a general enactment for the ratable distribution of the estate of an insolvent among all the creditors had the effect of preventing any individual creditor, while retaining collateral security on part of the estate, from proving for his whole debt.

In 1864, Congress, in the first national bank act, after providing for the appointment of a receiver with power to convert the assets of any insolvent national bank into money and pay it to the treasurer of the United States, subject to the order of the comptroller of the currency, further provided that "from time to time the comptroller, after full provision shall

have been first made for refunding to the United States any such deficiency in redeeming the notes of such association as is mentioned in this act, shall make a ratable dividend of the money, so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." Act of June 3, 1864, c. 106, § 50; 13 Stat. 115.

The words of this act, requiring "a ratable dividend" to be paid "on all claims" proved or adjudicated, are equivalent to the words of the last preceding bankrupt act, directing that "all creditors coming in and proving their debts" "shall be entitled to share" in the estate "*pro rata*, without any priority or preference whatsoever;" and, in view of the judicial construction which had been given to that act, may reasonably be considered as having been intended by Congress to have the same effect of preventing a creditor, secured on part of the estate, from proving his whole debt without relinquishing or applying the security, although neither act specifically so provided.

If such was the rule under the national bank act of 1864, it could not be affected, as to national banks, by the express affirmance of the rule in the bankrupt act of 1867, or by the reënactment of the provisions of each of these two acts in the Revised Statutes. And the extension of the bankrupt act of 1867 to "moneyed business or commercial corporations and joint stock companies" increases the improbability that Congress intended banking associations to be governed by a different rule from that governing other private corporations, as well as natural persons, in regard to the effect which a creditor's holding collateral security should have upon the sum to be proved by him against an insolvent estate. Act of March 2, 1867, c. 176, §§ 20, 37; 14 Stat. 526, 535; Rev. Stat. §§ 5075, 5236.

Reliance has been placed upon the remark of Mr. Justice Swayne in *Lewis* v. *United States*, 92 U. S. 618, 623, that "it is a settled principle in equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor." But he added, "This

is admitted," so that it is evident that the point was not controverted by counsel, or much considered by the court. Nor was it necessary to the decision, which had nothing to do with the right of an individual creditor, holding security upon the separate property of the debtor, to prove against his estate in bankruptcy; but simply affirmed the right of the United States, holding a debt against an English partnership, to prove the whole amount of the debt against one of the partners, an American, in proceedings in bankruptcy here under the act of 1867, without surrendering or accounting for collateral security given to the United States by the partnership. The United States were not bound by the bankrupt acts, nor subject to the rule of a ratable distribution, but were entitled to preference over all other creditors. *United States* v. *Fisher*, 2 Cranch, 358; *Harrison* v. *Sterry*, 5 Cranch, 289; *United States* v. *State Bank*, 6 Pet. 29; *United States* v. *Herron*, 20 Wall. 251. And, even as to a private creditor, it has always been held that he is obliged to account for such securities only as he holds from the debtor against whose estate he seeks to prove; and that a creditor proving against the estate of a partnership is not bound to account for security given to him by one partner, nor a creditor proving against the estate of one partner to account for security given him by the partnership. *Ex parte Peacock*, (1825) 2 Glyn & Jameson, 27; *In re Plummer*, (1841) 1 Phil. Ch. 56; *Rolfe* v. *Flower*, (1866) L. R. 1 P. C. 27, 46; *In re Babcock*, 3 Story, 393, 400. To require a creditor, before proving against the estate of one partner, to surrender to the assignee of that estate security held from the partnership, would be to add to the separate estate property which should go to the estate of the partnership.

The ground and the limits of the rule in bankruptcy were clearly stated by Lord Chancellor Lyndhurst in *Plummer's case*, above cited, in which a partnership creditor was allowed to prove a partnership debt against the separate estate of each partner, without surrendering or realizing security held by him from the partnership. The Lord Chancellor said: "Now what are the principles applicable to cases of this kind? If

a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realizing his security. For the principle of the bankrupt laws is, that all creditors are to be put on an equal footing, and therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt; but if he has a security on the estate of a third person, that principle does not apply; he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than twenty shillings in the pound. That is the ground on which the principle is established; it is unnecessary to cite authorities for it, as it is too clearly settled to be disputed; but I may mention *Ex parte Bennet*, 2 Atk. 527; *Ex parte Parr*, 1 Rose, 76; and *Ex parte Goodman*, 3 Maddock, 373; in which it has been laid down. The next point is this. In administration under bankruptcy, the joint estate and the separate estate are considered as distinct estates; and accordingly it has been held that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security; on the ground that it is a different estate. That was the principle upon which *Ex parte Peacock* proceeded, and that case was decided first by Sir John Leach and afterwards by Lord Eldon, and has since been followed in *Ex parte Bowden*, 1 Deacon & Chitty, 135. Now this case is merely the converse of that, and the same principle applies to it." 1 Phil. Ch. 59, 60.

This court, under the existing national bank act, approving and following the example of the English courts under the statute of 13 Elizabeth, above cited, has allowed creditors to set off, against their claims on the estate, debts due from them to the debtor whose estate is in course of distribution, although the statute in question in either case contained no provision directing or permitting a set-off. *Scott* v. *Armstrong*, 146 U. S. 493, 511. In giving effect to a statute which simply directs an equal and ratable distribution of a debtor's estate among all creditors, without saying anything about either col-

lateral security or set-off, there would seem to be quite as much ground for requiring each creditor to account for his collateral security, for the benefit of all the creditors, as for allowing him the benefit of a set-off, to their detriment.

For the reasons thus indicated, I cannot avoid the conclusion that, under every act of Congress directing the ratable distribution among all creditors of the estate of an insolvent person or corporation, and making no special provision as to secured creditors, an individual creditor, holding collateral security from the debtor on part of the estate in course of administration, is not entitled to a dividend upon the whole of his debt, without releasing the security or deducting its value; and that therefore the judgment of the Circuit Court of Appeals should be reversed.